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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

James E. Douglas, Jr., Commissioner of Marine Resources of the Commonwealth of Virginia, appeals from the order and opinion of the three-judge District Court for the Eastern District of Virginia, entered on November 7, 1975, declaring void §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, as violative of the equal protection clause of the Fourteenth Amendment and the exclusive and preemptory authority of the federal government in regulation of "com-

mercial sea fisheries,"[1] and permanently enjoining appellant, his successors, agents and employees, from enforcement of the said statutes. The appellant files this Jurisdictional Statement asserting that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented by the appeal are substantial.

OPINION OF THE COURT BELOW

The order and opinion of the three-judge District Court declaring void §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, and enjoining their enforcement is not reported. The order and opinion are set forth in the Appendix, *infra*, at App. 1 and App. 2, respectively.

JURISDICTION

This suit was brought by the Appellees in the Court below before three judges, pursuant to 28 U.S.C. § 2284, seeking an order declaring unconstitutional two Virginia statutes and enjoining the enforcement of those statutes. The order and opinion of the three-judge District Court granting the relief requested by the Appellees was entered on November 7, 1975. Notice of Appeal was filed by the Appellant on January 5, 1976 in the United States District Court for the Eastern District of Virginia. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1253.

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[1] The Court below found that by enactment of 16 U.S.C. § 1081, *et seq.*, the federal government had exclusive and preemptory authority to regulate "commercial sea fisheries." The term "commercial sea fisheries" apparently refers, geographically, to the territorial waters of the United States, including all waters from the coast out to a limit twelve miles seaward of the coast, since that is the area addressed by 16 U.S.C. § 1081 *et seq.*

STATUTES INVOLVED

Section 28.1-60, Code of Virginia (1950), as amended, found in Volume 5A at page 94.

> (1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.
>
> (2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.
>
> (3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, sein, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent,

upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Section 28.1-81.1, Code of Virginia (1950), as amended, found in Volume 5A, Supplement, at page 29.

(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens of the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five per centum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person

who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

QUESTIONS PRESENTED

1. Whether the doctrine of federal abstention is applicable where persons denied commercial fishing licenses under state fisheries statutes challenge the constitutionality of those statutes in federal court?
2. Whether enactment of 16 U.S.C. § 1081, prohibiting foreign vessels from fishing in United States territorial waters except upon concurrent federal and state authorization, reserves to the federal government exclusive and preemptive authority to regulate fisheries within the three-mile limit?
3. Whether enforcement of a state fisheries law which applies to all state waters, both inland and coastal, may be enjoined completely on the basis of its preemption by a federal fisheries statute which applies only to coastal waters?
4. Whether the equal protection clause of the Fourteenth Amendment precludes enforcement of state laws designed to protect state fisheries from incursions of foreign fishing interests by requiring commercial fishing licensees to be United States citizens?
5. Whether the equal protection clause of the Fourteenth Amendment precludes states from reserving to state residents fisheries within their inland waters?

STATEMENT OF THE CASE

On July 14, 1975 the Appellees filed in the District Court below a Complaint and Motion for Preliminary Injunction, requesting that a three-judge court be convened pursuant to 28 U.S.C. § 2284 to declare §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, unconstitutional and to enjoin the Appellant from enforcement of said statutes. On the same date Appellees filed a Motion for a Temporary Restraining Order against Appellant's continued enforcement of § 28.1-81.1 pursuant to which Appellees had been denied commercial fishing licenses for failure to satisfy United States citizenship requirements of the aforementioned statute.

The District Court, with one judge sitting, denied Appellees' request for a Temporary Restraining Order on July 15, 1975. On July 18, 1975 the lower court granted Appellees' request that a three-judge court be convened to consider the full Complaint and Motion for Preliminary Injunction. An Answer and Motion to Abstain were filed on July 31, 1975 by the Appellant. On October 1, 1975 the Appellees filed a Motion for Summary Judgment. On October 15, 1975 the District Court of three judges heard argument on all Motions previously filed and argument on the merits of the Complaint. By order entered on November 7, 1975 the District Court granted Appellees' Motion for Summary Judgment, finding both statutes in question unconstitutional and enjoined further enforcement of each statute by the Appellant.

The Appellant, James E. Douglas, Jr., is the Commissioner of Marine Resources for the Commonwealth of Virginia and is charged with responsibility for enforcement of Virginia's statutes regulating commercial fisheries. Va. Code Ann. § 28.1-13.

The Appellee, Seacoast Products, Inc., is a Delaware corporation with principal offices in New Jersey. The Appellee, Smith Meal Corporation, is a Massachusetts corporation with its main office in New Jersey. Second Oceanic Corporation is a New York corporation and has its principal offices in that state. Smith Meal and Second Oceanic are subsidiaries of Seacoast, which in turn is ultimately controlled by Hanson Trust, Ltd., a corporation organized under the laws of the United Kingdom and wholly owned by alien stockholders.[2] Appellees are engaged in, among other businesses, the taking and processing of menhaden fish for the manufacture of fish meal, fish solubles used in animal feed, and fish oil for manufacture of margarine. Prior to the enactment of § 28.1-81.1 in 1975 the Appellees had applied for and obtained non-resident licenses for vessels to fish for menhaden within the three-mile limit off the coast of Virginia, but the record will show that they had engaged in minimal fishing activity in Virginia waters in recent years. (Stipulation of October 15, 1975). Contrary to the District Court's assertion at page 4 of its opinion (App. 3) Appellees had not historically fished for menhaden in the Chesapeake Bay, since Virginia Code, § 28.1-60, one of the statutes here in question, precluded menhaden fishing by non-resident corporations in the Chesapeake Bay.

It should, furthermore, be noted that § 28.1-81.1, requiring United States citizenship as prerequisite to obtaining commercial fishing licenses in Virginia, applies to all types of licenses, not only menhaden licenses and applies to all Virginia waters, not merely the waters within the three-mile limit. The Court below states incorrectly on page 3 of its opinion (App. 2) that § 28.1-81.1 applies only to the waters of the three-mile limit off Virginia coast.

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[2] The ownership of more than twenty-five percent of Appellees' corporate stock by aliens rendered Appellees ineligible for fishing licenses under § 28.1-81.1(b).

THE QUESTIONS ARE SUBSTANTIAL

Whether The Doctrine Of Federal Abstention Is Applicable Where Persons Denied Commercial Fishing Licenses Under State Fisheries Statutes Challenge The Constitutionality Of Those Statutes In Federal Court?

The decision of the lower court, in refusing to abstain, represents a departure from the guidelines established by this Court in *Alabama Public Service Commission* v. *Southern Rwy. Co.,* 341 U.S. 341 (1951), *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943) and *Great Lakes Dredge Co.* v. *Huffman,* 319 U.S. 293 (1943). In these cases there is enunciated a sound policy of federal abstention in order "to avoid obstruction of the domestic policy of the states." *Great Lakes Dredge Co., supra.* The central notion of the aforementioned decisions is that domestic policies and programs of the states should not be lightly overturned on constitutional grounds by federal courts granting equitable relief, particularly where the complaining parties have adequate remedies in state courts. The Appellees in this case have adequate remedies under state law affording opportunity for state court review of the Appellant's decision denying them licenses. Va. Code Ann. §§ 28.1-33 and 28.1-34. The federal constitutional questions raised by the Appellees could be raised before state tribunals.

Moreover, by abstention in this case, the lower court would have avoided needless interference with the uniquely complex problem of managing state fisheries resources. This Court, in *Reetz* v. *Bozanich,* 397 U.S. 82 (1970) recognized the inherent complexity of the factors bearing upon state management of fisheries resources as justification for federal abstention. In the instant controversy, as in *Reetz,* state statutes bearing on eligibility for fishing licenses are questioned on constitutional grounds. The *Reetz* Court, in balancing the possible hardship placed upon those denied licenses against the disruption of complex programs for state resources management noted that the state provisions challenged related to fish resources, a "unique resource, the management of which is a matter of great state concern." *Reetz, supra.* Any question of unclear state law in *Reetz* was at best a secondary consideration, the Court noting that interpretation might "conceivably avoid" decision upon the constitutional questions.

The impact of the lower court's decision upon domestic fisheries management in Virginia cannot be minimized. By voiding § 28.1-60 the District Court leaves the limited, yet vital, menhaden resource of the Chesapeake Bay in jeopardy of serious depletion by the influx of menhaden vessels from neighboring states. Moreover, Virginia's fisheries resources generally are now vulnerable to the characteristically predatory fishing practices of foreign fishing interests as a result of invalidation of § 28.1-81.1. The balancing of state concerns against the interests of those denied licenses here, as in *Reetz,* results in the conclusion that federal abstention from this controversy is proper.

Whether Enactment Of 16 U.S.C. § 1081, Prohibiting Foreign Vessels From Fishing In United States Territorial Waters Except Upon Concurrent Federal And State Authorization, Reserves To The Federal Government Exclusive And Preemptive Authority To Regulate Fisheries Within The Three-Mile Limit?

The District Court, in reviewing the constitutionality of Virginia Code § 28.1-81.1, which makes United States citizenship a prerequisite to eligibility for all commercial fishing licenses, finds that Congressional enforcement of 16 U.S.C. § 1081 (App. 7), ". . . preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them . . ." (App. 5). Thus, it is held that

Congress, by enactment of a federal statute addressing the very limited subject of fishing in United States territorial waters by foreign vessels, has thereby preempted the entire field of fisheries regulation in coastal waters, including fisheries within the three-mile limit.

The practical implications of the District Court's holding are devastating to the legitimate interests of the states in regulating commercial fishing activity off their coasts within the three-mile limit. That the states have the authority to regulate coastal fisheries inside the three-mile limit so long as there is no conflict with federal enactments has long been recognized. *Skiriotes* v. *Florida,* 313 U.S. 69 (1941). Since the decision below finds that states are preempted from regulation of "commercial sea fisheries" in general, states would be powerless to regulate fishing off their coasts by United States vessels. Any and all state conservation laws and regulations dealing with net sizes, types of vessels and equipment used in coastal fisheries by United States vessels, as well as foreign vessels, would be superseded and preempted by 16 U.S.C. § 1081 under the District Court's holding. Clearly this could never have been the intent of Congress in the enactment of 16 U.S.C. § 1081.

The District Court, in this regard, is at odds with the most elementary principles of preemption laid down by this Court in *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Kelly* v. *Washington,* 302 U.S. 1 (1937), *Mintz* v. *Baldwin,* 289 U.S. 346 (1933), *Savage* v. *Jones,* 225 U.S. 501 (1912) and *Reid* v. *Colorado,* 187 U.S. 137 (1902). In each of the above-mentioned cases this Court held to the effect that ". . . Congress having occupied but a limited field, the authority of the state to protect its interests by additional or supplementary legislation otherwise valid is not impaired." *Skiriotes, supra,* at 75. Accordingly, to the extent that the District Court finds 16 U.S.C. § 1081 preemptive of state

laws regulating matters other than use of United States coastal fisheries by foreign vessels, it is patently wrong.

Moreover, even if the District Court's preemption holding is limited such that 16 U.S.C. § 1081 is viewed as preempting only state statutes dealing with use of coastal fisheries (within the three-mile limit) by foreign vessels, such a finding is clearly erroneous. According to familiar principles, in order to find federal enactments preemptive there must be expressed statutory intent to preempt the field in question or it must be shown that federal and state regulation of a field cannot operate together consistently. *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963); *Savage* v. *Jones,* 225 U.S. 501, 535 (1912). It cannot be seriously argued that 16 U.S.C. § 1081 contains any express intent to occupy the field of regulating foreign fishing in state coastal waters. To the contrary, 16 U.S.C. § 1081 requires that any federal approval of foreign fishing thereunder is conditioned upon the concurrence or approval of any affected state or territory. Yet the District Court, in describing the purport of 16 U.S.C. § 1081 blandly states that the vitality of Virginia Code § 28.1-81.1 is superseded by the federal enactment which declares "as far as pertinent here that '[i]t is unlawful for any vessel, except a vessel of the United States . . . to engage in the fisheries within the territorial waters of the United States . . .' *except upon authorizations not relevant here.*" (Emphasis supplied.) The authorizations required under 16 U.S.C. § 1081 include authorization of affected states and, therefore, could not be more relevant in any determination than 16 U.S.C. § 1081 is preemptory of state laws. Indeed, the requirement of 16 U.S.C. § 1081 that state approval be given prior to federal approval of foreign fishing indicates an express intent to avoid preempting state interests. It is furthermore evident that the federal and state statutes here involved may

operate concurrently without one frustrating the effect of the other. The operation of Virginia Code § 28.1-81.1 in precluding foreign fishing within the three-mile limit would not of itself eliminate the possibility of federal authorizations under 16 U.S.C. § 1081 allowing foreign vessels to fish off Virginia's coast between the three-mile limit and the outer limit of United States territorial waters twelve miles offshore. Virginia could concur in federal approval of foreign fishing beyond the three-mile limit off its coast under 16 U.S.C. § 1081 consistent with the provisions of § 28.1-81.1 of its own law prohibiting foreign fishing within the three-mile limit. The federal and state enactments in question are clearly consistent in their purpose, both limiting foreign fishery in United States coastal waters. This is not to say that the federal government could not preempt state laws dealing with foreign fishing within three miles of the coast under the holdings of *Skiriotes* and other cases. The fact is, however, that the provisions of 16 U.S.C. § 1081 evidence no intent on the part of the Congress to effect a preemption, but instead reveal an intention to the contrary.

By holding that 16 U.S.C. § 1081 ". . . preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them . . ." (App. 5) the District Court has left in doubt the formerly settled legal principles governing the federal-state relationship in regulation of commercial fisheries within the three-mile limit. As a result no state can confidently enact necessary new laws or continue to enforce existing laws regulating and managing coastal fisheries within the three-mile limit, even though such state laws in no way conflict with federal enactments or treaties. The rules formerly set out in *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Toomer* v. *Witsell,* 334 U.S. 385 (1948) and *United States* v. *California,* 332 U.S. 19 (1947)

are now unsettled by the opinion of the lower court. In short, the importance of clarifying the important relationship between federal and state authority in the regulation of sea fisheries within the three miles of the coast is sufficient reason for this Court to consider this case fully, with briefs and argument on the merits.

Whether Enforcement Of A State Law Which Applies To Inland And Coastal State Waters May Be Enjoined Completely On The Basis Of Preemption By A Federal Statute Which Applies Only To Coastal Waters?

The federal statute, 16 U.S.C. § 1081, found as preemptive of Virginia Code § 28.1-81.1, clearly applies only to United States territorial waters between the United States coast line and a limit twelve miles offshore. Section 28.1-81.1 of the Virginia Code, on the other hand, applies generally to all Virginia waters, both coastal waters inside the three-mile limit and inland waters as well. The lower court has enjoined the enforcement of § 28.1-81.1 generally, finding it superseded by 16 U.S.C. § 1081, which, of course, has no application to Virginia's inland waters. It is, therefore, apparent that the decision of the District Court is in direct contravention of the principles of preemption established in *Savage* v. *Jones, supra, Mintz* v. *Baldwin, supra,* and *Kelly* v. *Washington, supra.* Consequently, the Appellant is left powerless to enforce in inland waters of the State a law designed to protect all of Virginia's waters from incursions by foreign fishing interests because of its alleged preemption by a federal law having no application to inland fishery. This imprecise and clearly erroneous holding of the District Court further confuses the interplay of federal and state regulation of commercial fisheries and amplifies the substantiality of the questions which are urgently in need of resolution by this Court.

Whether The Equal Protection Clause Of The Fourteenth Amendment Precludes Enforcement Of State Laws Designed To Protect State Fisheries From Incursions Of Foreign Fishing Interests By Requiring Commercial Fishing Licensees To Be United States Citizens?

Virginia Code § 28.1-81.1, requiring United States citizenship as a prerequisite to eligibility for all commercial fishing licenses, is predicated upon the well established fact that those persons who live near a natural resources and are continually dependent upon the resource for their livelihood do, in fact, utilize and conserve the resource more responsibly. It has been well established statistically and through practical experience that foreign fishing interests practice predatory, wasteful fishing techniques resulting in drastic depletions of vital American fishery stocks. National Marine Fisheries Statistics, published by the United States Department of Commerce, document the foregoing premises. Comparison of 1973 Virginia landings of four important coastal fish species with the average landings of the same species for the ten years preceding 1973 show startling stock depletions.[3] The statistics reveal a direct relationship between the timing of noticeable stock depletions and the entry of foreign fishing effort.

Prior to enactment of § 28.1-81.1, the only requirement for obtaining commercial fishing licenses in Virginia was residency. Va. Code Ann. §§ 28.1-47, 28.1-48, 28.1-57. Thus any corporation located and operating in Virginia could obtain commercial fishing licenses and operate in all inland and coastal waters of the state, irrespective of the fact that the corporate stock may have been owned by totally foreign interests. Quite obviously, those who own corporate stock determine corporate policy and fishing practices. Establishing Virginia shell corporations and use of American crews by foreign controlled corporations will in no way deter a corporate policy of predatory fishing. Accordingly, Virginia fishery stocks were, prior to enactment of § 28.1-81.1, vulnerable to the predatory fishing effort of foreign-owned shell corporations which might have been established in Virginia for the sole purpose of meeting the residency requirement for obtaining licenses.

[3] Complete reference to the statistics is contained in the Deposition of James E. Douglas, Jr., Appellant, pp. 10-11, filed as part of the record.

Federal law provides no additional protection. As noted above, 16 U.S.C. § 1081 provides that only "United States vessels" may engage in the fisheries of United States territorial waters. Pursuant to 46 U.S.C. § 251 "United States vessels" are defined as those of twenty-tons or more meeting federal enrollment requirements and having a current license. Vessels of less than twenty-tons need only have a license, and are not required to be enrolled. Enrollment as a United States vessel requires, pursuant to 46 U.S.C. § 252 and 46 U.S.C. § 11, only that the vessel be built within the United States and that it be owned wholly by United States citizens. The requirement of 46 U.S.C. § 11 that the vessel be owned wholly by United States citizens has been applied to corporate ownership of fishing vessels so as to require only that the corporation owning the vessel be organized under the laws of one of the United States and located in that state. Ownership of the stock in such domestic corporations owning fishing vessels may be entirely alien; so long as the foreign owned corporation establishes a domestic shell corporation in the United States its vessels will qualify as "United States vessels" eligible to fish in United States waters. It is, therefore, apparent that neither Virginia law nor federal law, prior to enactment of § 28.1-81.1, protected Virginia fisheries from the predatory fishing efforts of wholly alien-owned shell corporations which might be

domesticated in Virginia and, thereafter, operate freely in any and all of Virginia's waters.

If Virginia Code § 28.1-81.1 is deemed invalid, Virginia and every other state with valuable domestic fisheries will be powerless to prevent the potentially devastating effect of the predatory practices of foreign-owned corporations, owned and controlled abroad by those with no permanent vested interest in conservation of the resource.

While the District Court did not squarely meet the Appellees' contention that the citizenship requirement of Virginia's statute violates principles of equal protection, there is some intimation of that view in portions of the lower court's opinion (App. 3).

This Court has consistently recognized a right of the states to distinguish between citizens and aliens with respect to matters in which the states have a proprietary interest. In *Hauenstein* v. *Lynham,* 100 U.S. 483 (1880) and *Blythe* v. *Hinckley,* 180 U.S. 333 (1901) state provisions barring aliens from the devolution of real property were upheld. Laws barring aliens from the ownership of real property were approved by this Court in *Terrace* v. *Thompson,* 263 U.S. 197 (1923), *Porterfield* v. *Webb,* 263 U.S. 225 (1923) and *Webb* v. *O'Brien,* 263 U.S. 313 (1923).

The proprietary interest of states in conserving their natural resources has, as well, been recognized by this Court. A state law barring aliens from hunting wild game was sustained against an equal protection challenge in *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914). In *McCready* v. *Virginia,* 94 U.S. 391 (1877) a Virginia law reserving to state residents the right to take oysters from the state's river beds was held valid. While invalidating as a denial of equal protection an Arizona law discriminating against aliens in *all* occupations in *Truax* v. *Raich,* 239 U.S. 33 (1915), this

Court noted that a special state interest with respect to *any particular business or occupation* could justify a law barring aliens from that particular occupation. The Court, in *Truax,* specifically distinguished the law there found invalid from laws relating to a state's natural resources. Virginia's statute under scrutiny here limits its proscription against aliens to a single business or occupation and that occupation is integrally related to preservation of state natural resources.

The decision of this Court in *Takahashi* v. *Fish Commission,* 334 U.S. 410 (1948) is, for a number of reasons, not persuasive or controlling here. Initially, it is important to note that the classification made by the California law in *Takahashi* was essentially racial rather than one of alienage. Only those "ineligible for United States citizenship" were barred from the California commercial fishery. The practical effect of the law was to bar primarily persons of Japanese origin. Moreover, the California law was defended as a conservation measure on the flimsy premise that elimination of those ineligible for citizenship reduced the numbers of commercial fishermen, thereby conserving stocks. Virginia's law does not exclude non-citizens for the sake of eliminating a portion of the fishing effort irrespective of any other distinguishing characteristic of the eliminated group. The Virginia law is, on the other hand, supported by statistical evidence showing the ill effects of foreign fishing practices upon efforts to conserve stocks. It is not alienage *per se,* but the characteristic fishing practices of foreign fishing interests which the Virginia statute seeks to avoid. Finally, in considering the applicability of *Takahashi* here it is of critical importance to note that the precedents sustaining alienage classifications which protect state proprietary interests in *Patsone, Hauenstein, Blythe, Terrace* and *Porterfield,* were rejected in *Takahashi* because the court viewed as tenuous the claim by California that it had a

proprietary interest in fish within the three-mile coastal waters. Whatever doubts this Court may have had in *Takahashi* regarding state ownership of fish in coastal waters must certainly have been put to rest by the subsequent enactment of the Submerged Lands Act, 43 U.S.C. § 1301 *et seq*. Section 1311 of that enactment confirms the title and ownership of states in submerged lands and natural resources in and under navigable waters within state boundaries, including any and all fish and other marine life therein. Section 1301 defines "natural resources" to include virtually all types of fish and shellfish. In view of this clear and unequivocal confirmation of state proprietary ownership in its fisheries resources it cannot now be seriously maintained that *Takahashi* is controlling of the question here. Instead, the proprietary interest of the states in their fisheries having now been established, Virginia's law which seeks to protect that vital interest from the depredations of foreign fishing interests should, therefore, be sustained. *Patsone, supra; Terrace, supra; Hauenstein, supra; Porterfield, supra.*

Whether The Equal Protection Clause Of The Fourteenth Amendment Precludes States From Reserving To State Residents Fisheries Within Their Inland Waters.

Placing reliance in this Court's decisions in *Takahashi* v. *Fish Commission,* 334 U.S. 410 (1948) and *Toomer* v. *Witsell,* 334 U.S. 385 (1948), the District Court declared violative of the equal protection clause Virginia Code § 28.1-60, reserving to state residents the menhaden fishery inside the Virginia portion of Chesapeake Bay. For essentially the same reasons discussed above with respect to § 28.1-81.1, *Takahashi* has, contrary to the holding of the District Court, no application to the question presented here in regard to § 28.1-60. *Takahashi* turned upon the failure

of this Court to find a state proprietary interest in coastal fisheries sufficient to justify barring aliens. The effect of the Submerged Lands Act is to make clear the states' proprietary interest in their fisheries and, thereby, render inapplicable here the principles controlling *Takahashi*. For the same reason *Toomer* is not dispositive of the constitutional challenge made with respect to Virginia's residency law. Moreover, the statute here in question reserves to residents an inland fishery within the Chesapeake Bay. *Toomer* dealt with state residency requirements in coastal fisheries. The states' ownership of fisheries in inland bodies of water has never been seriously questioned as was ownership of coastal fisheries prior to the Submerged Lands Act.

The principles set forth in *McCready* v. *Virginia,* 94 U.S. 391 (1877), recognizing the clear right of a state to reserve for its residents the natural resources of its waters which it owns and holds in trust for its citizens, are equally applicable here. The same rights of the states to reserve their natural resources were recognized by this Court in *Geer* v. *Connecticut,* 161 U.S. 519 (1896) and again in *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914).

The decision of the District Court, failing as it does to distinguish *Takahashi* and *Toomer* from the instant situation as altered by the Submerged Lands Act, indeed, has the effect of depriving Virginia of the rights and interests in her submerged lands and fisheries that the federal enactment (43 U.S.C. § 1301 *et seq.*) was intended to convey. It cannot be more clear from the face of the Submerged Lands Act itself that one of the purposes of that legislation was to settle upon the states, free of any doubt, full right and title to the submerged beds and resources located over and upon those lands. This Court can, by review of the District Court's decision, once and for all, effect the obvious purpose of the Submerged Lands Act, confirming the proprie-

tary interest of the states in their limited natural resources, and reaffirm the right of the states to protect their interest established in *Patsone, McCready* and other decisions of this Court noted above.

CONCLUSION

For the reasons herein stated probable juris should be noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for James E. Douglas, Jr., in the above captioned matter, hereby certify that three (3) copies of this Jurisdictional Statement have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 5th day of January, 1975, as follows:

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All persons required to be served have been served.

JAMES E. KULP
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APPENDIX

* * *

FINAL ORDER

Filed November 7, 1975

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, Adjudges, Orders and Decrees:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiffs recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

* * *

OPINION OF THE COURT BELOW

Filed November 7, 1975

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are

[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 US 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 USC 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 USC 2281 and 2284.

[3] There are no critical, genuine factual differences between the parties.

the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention have no place. In other circumstances they are appropriate: to obtain interpretation of a state statute, Railroad Commission v. Pullman Co., 312 US 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 US 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 US 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 US 592, 602 (1975); *Younger*, supra, at 53-54; Zwickler v. Koota, 389 US 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not proposed to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 US 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi,* supra, at p. 420, and in Toomer v. Witsell, 334 US 385, 401 (1948) declined to treat, as *contra,* McCready v. Virginia, 94 US 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 USC 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . ," except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 US 385, 393, 394 (1948); United States v. California, supra, 332 US 19 (1947); Skiriotes v. Florida, 313 US 69, 75 (1941); Manchester v. Massachusetts, 139 US 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 USC 1081 to fish within the Virginia 3-mile limit. The acceptance was

ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 USC 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-mile sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester,* supra—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall

and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since its loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 US 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 US 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

* * *

§ 1081. PROHIBITION AGAINST FISHING IN TERRITORIAL WATERS; EXCEPTIONS

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign

fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

MOTION FILED

MAR 8 1976

In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,
Appellees.

Motion For Leave To File Brief Amici Curiae And Brief Amici Curiae In Support Of Statement As To Jurisdiction To Review Judgment Of The United States District Court For The Eastern District Of Virginia

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In The

Supreme Court of the United States

October Term, 1975

No. 75-.....

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

The *amici curiae*[1] are all Virginia seafood producers. The Virginia Seafood Council is a non-profit organization that represents more than 100 members who, together, produce more than 95% of the seafood taken from Virginia waters. The other *amici curiae* account for 60% of all fin fish caught in Virginia waters and a substantial portion of oysters, crabs, and other shell fish taken therein.

The court below held invalid two of the basic provisions of the Virginia Code governing the fishing industries operating in that State. Obviously, the *amici*, whose operations are controlled by that Code, are directly and substantially affected by the judgment below and should be given an

[1] Virginia Seafood Council, L. D. Amory & Company, Inc., Chesapeake Herring Corp., The D. L. Edgerton Co., Lance C. Fisher, J. W. Ferguson Seafood Co., Inc., Fass Bros., Inc., Mr. Frosty Seafood, Inc., J. H. Lewis Seafood Company, W. F. Morgan & Sons, Inc., RCV Seafood Company, Shackelford-Schlifer Seafood Corp., Virginia Seafoods, Inc., Zapata Haynie Corporation.

opportunity to express their arguments on the law and the facts before this Court. In light of the judgment below, there is no other forum in which the rights of the great majority of participants in the Virginia fishing industry can be expressed or protected.

The court below held that § 28.1-60 of the Code of Virginia of 1950, as amended, (see Appendix B), violated the Equal Protection Clause of the Fourteenth Amendment. But, because the judgment was a response to a motion for summary judgment, and because the trial court was anxious for a speedy judgment, no opportunity was afforded Appellant to produce evidence of either a rational basis or a compelling state interest for the classifications. These classifications that have been held invalid have long existed in the laws of the Commonwealth of Virginia, in the laws of a dozen other States, and indeed, in the laws of the United States.

The court below also held that § 28.1-81.1 of the Code of Virginia of 1950, as amended (see Appendix B), violated the Supremacy Clause of the Constitution, art. VI, ¶ 2, because of preemption of this state law by the Act of 20 May 1974, 78 Stat. 194, 16 U.S.C. § 1081. Since this preemption concept sprang full-blown from the heads of the three judges who made up the trial court, without any argument or evidence offered or taken on the issue, again no one had any opportunity to present the case against a complete upheaval of the relevant roles of the States and the national government in the regulation of state and coastal fisheries.

Wherefore, *amici curiae* respectfully move that their petition to file a brief *amici curiae* in support of Appellant's Jurisdictional Statement, as well as his brief on the merits,

be granted. The motion is made necessary because, although Appellant's consent has been secured, the Appellees have denied their consent to the filing of this brief.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1975

No. 75-.....

JAMES E. DOUGLAS, JR.,
Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,
Appellees.

BRIEF AMICI CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

INTERESTS OF AMICI CURIAE

The interests of the *amici curiae* in this litigation are set out at pp. *v, vi, supra,* in the Motion for Leave to File.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on 7 November 1975. It is not yet reported. Copies of the opinion and final order are attached hereto as Appendix A.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered by a three-judge district court convoked under 28 U.S.C. § 2284, on 7 November

1975. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, ¶ 2 and the Equal Protection Clause, Amendment XIV, § 2. The statutory provisions are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1. These statutes and provisions are set out in full in Appendix B.

QUESTIONS PRESENTED

1. Do state licensing statutes, which classify in terms of residency or citizenship, violate the Equal Protection Clause, although the classification is of ancient and justifiable origins, is the same as that of at least twelve other states, derives from national law which with state law is mutually controlling of the subject, and is justified by compelling state interests?

2. Does a federal statute providing for coordinate federal control preempt state authority, existing at least since 1781, over fisheries in state territorial waters, although the terms of the federal statute, its purpose, its legislative history, and other federal legislation all read against such preemption?

STATEMENT

This case is concerned with the capacity of the Commonwealth of Virginia to protect its fisheries against depredations by outsiders. The particular fisheries in question are the marginal sea off the Virginia coast and Virginia's chief inland sea, the Chesapeake Bay. The fish in question here

are essentially the menhaden, which are taken primarily for conversion into oils and fish meal.

Menhaden is the most valuable fishery resource in Virginia. Although menhaden are found in some degree from Maine to Florida, the Chesapeake Bay acts as a nursery for the development of the fish. While final data is not yet complete, studies over the last several years indicate that the fish spawn at sea off the Virginia and North Carolina capes and large numbers enter the sheltered waters of the Chesapeake Bay and its tributaries as fingerlings. In the estuarine waters of the major tributary rivers (which by statute in Virginia are protected against menhaden fishing) the small menhaden develop in great numbers. As they mature into fish of one and two years of age they school in the Bay between May and December of each year and form the basis for the resource fished by the Virginia industry. In the winter and spring many of the larger fish leave to spawn at sea and thence to range along the Atlantic coast. Alone among the Atlantic states, Virginia imposes seasonal limits on fishing for menhaden, limitations on net mesh size, and protects selected waters for small fish development.

While menhaden, as most fin fish, are quite mobile, and as older fish range for considerable distances, the distinguishing feature of menhaden in Virginia waters during their first two years of life is their relative stability. They form a particularly stable population as one and two year old fish during the Virginia menhaden fishing season extending from May to December. It is against this relatively stable fishing stock that the Virginia menhaden fishing effort is directed.

The season is changed periodically and the fishing effort imposed upon this resource is adjusted from time to time, based upon recommendations of scientists at the Virginia Institute of Marine Science and the National Marine Fisheries Service and the Virginia producers. The resource is

recognized by the participants as being of immense value, but requiring great care in terms of its preservation.

Since the earliest days of the Republic, both the States and the national government have exercised concurrent control over the commercial fisheries of the country. Thus, while a vessel must be documented by the national government,[1] it must also have the permission of the state to fish the local waters. And it is in connection with this second requirement that the issues in this case arise.

The Appellees here, plaintiffs below, brought suit to enjoin the enforcement of two provisions of the Virginia Code governing the taking of fish off the Virginia shores and in the Virginia bays. The first of these is § 28.1-60 of

[1] Federal statutes relating to the documentation of fishing vessels are set forth in 46 U.S.C. §§ 11, 251, and 252. In passing it should be noted that the court below confused 46 U.S.C. §§ 808 and 839 with federal documentation laws for fishing vessels. These sections of the Shipping Act of 1916 gave rise to the administrative hearings referred to in the appellees' pleadings below and preclude the sale of American documented vessels to foreign interests without the consent of the Secretary of Commerce. The hearing mentioned did not amount to a judicial determination of documentation of the vessels in American fisheries or licensing in the Virginia fisheries. The sections of the Shipping Act under which the hearing was conducted relate solely to an approval of the sale of vessels to aliens. After the sale was approved, the vessels could have been enrolled in fisheries of any jurisdiction depending on the laws of that jurisdiction.

Whether or not the vessels are enrolled in fisheries of the United States depends upon the applicable laws of the United States and the states in which the vessels are proposed to be used. Despite the assertion of the court below to the contrary. the Secretary of Commerce did not direct that these vessels be enrolled in American fisheries. The court below betrayed its misunderstanding of 46 U.S.C. §§ 808 and 839, and the hearings mentioned in the appellees' trial briefs, when it stated that "the acceptance [of the 68 vessels into the American fisheries] was ordered by the Secretary of Commerce under the provisions of the Shipping Act, of 46 U.S.C. 808, 839." In fact, the Secretary of Commerce merely signed orders permitting the vessels to be sold to aliens.

the Code of Virginia of 1950, as amended; the second is § 28.1-81.1 of the same Code.

It was on 23 March 1871 that the General Assembly of the Commonwealth adopted the predecessor of § 28.1-60. While the provision has been amended from time to time with regard to matters not revelant here, it has remained substantially the same since the time of its inception.

In essence, § 28.1-60 prohibits non-residents from taking fish for the purpose of converting the same into oil, fish meal, etc., except as provided in § 28.1-60(e). Under this subsection a non-resident may take "menhaden" within the marginal sea between the last Monday in May and the first day of December of each year, provided a license is obtained. The effect of the statute is to prohibit non-residents from taking menhaden within Virginia's chief inland sea, the Chesapeake Bay. Residents are permitted to fish pursuant to the terms of Virginia Code § 28.1-59 in designated portions of inland waters comprising the Chesapeake Bay and its tributaries, but the main rivers are closed to the taking of menhaden both by residents and non-residents.

The second statute under attack is § 28.1-81.1 of the Code of Virginia of 1950, as amended, which was signed by the Governor of Virginia and became effective on 19 March 1975. The effect of this statute is to reserve the harvesting of fish in Virginia waters to citizens of the United States. It is intended to deal with the problem of the threatened destruction of Virginia's fisheries by foreign fishing practices. As a result of overfishing by foreign interests, Virginia has experienced the virtual elimination of certain formerly important fisheries, such as the river herring. Treaties and other regulatory agreements have had no apparent effect upon the practices of these foreign interests, which fish a resource to exhaustion and then move on to another fishery resource. Realizing that the 200 mile fisheries limit legislation

before Congress would soon become a reality, and further realizing that such action would create new impetus for foreign fishing fleets to seek all available legal means to operate in coastal waters of the states, various fisheries interests, including several of the companies acting as *amici curiae* herein, testified as to the effect of foreign fishing practices on fishing stocks in support of legislation before the General Assembly to close the "loophole" which would permit foreign owned fishing vessels to fish through shell corporations in Virginia waters. The statements of Ammon G. Dunton, Jr. and Allen W. Haynie, in support of this legislation before the Committee on Agriculture, Conservation and Natural Resources, in the Virginia State Senate, and the Committe on the Chesapeake and Its Tributaries, in the House of Delegates, respectively, are annexed hereto as Appendices C and D to indicate the purpose of this legislation. The bill was also recommended by the unanimous vote of the Virginia Marine Resources Commission at a duly convened meeting on 28 January 1975. The bill was voted out of the Senate committee without a dissenting vote. Upon the floor of the Senate, consisting of 40 members, the bill was adopted by the vote of 40 to 0.

In the House of Delegates, the bill was referred to the Committee on the Chesapeake and Its Tributaries, which approved the bill by unanimous vote. On the floor of the House the bill was approved as emergency legislation by the vote of 85 to 0.

Appellees are corporations organized and with their principal places of business outside of the Commonwealth of Virginia. Seacoast Products, Inc., the parent corporation among the appellees, although organized under the laws of New York, is wholly owned by Hanson Trust Ltd., an English Corporation. These appellees have been engaged in taking menhaden from the Atlantic Ocean, including some

from the territorial waters of the Commonwealth of Virginia. They have not in the past taken fish from the Chesapeake Bay.

On 22 May 1975, one of the appellants, The New Smith Meal Company, Inc., made application for a Virginia license to fish for menhaden in Virginia territorial waters. That license was denied because § 28.1-81.1 of the Virginia Code forbids the issuance of such licenses to non-citizens of the United States.

This action was instituted on 14 July 1975. It sought to enjoin appellant from enforcing Code of Virginia §§ 28.1-60(3) and 28.1-81.1 upon the grounds that said provisions violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and upon the ground that the statutes place an undue burden on interstate commerce in violation of U.S. Const., art. I, § 8. On 18 July 1975, a special three-judge court was designated to consider the issues. Subsequently, the Appellant filed his answer and a motion for the federal court to abstain.

On 7 November 1975, a judgment and an opinion were rendered sustaining a motion by Appellees for summary judgment and dismissing Appellant's motion for abstention.

The three-judge court held that the Virginia laws in question violated the Equal Protection Clause by distinguishing between citizens and non-citizens and between residents and non-residents for purposes of issuing licenses for fishing in Virginia territorial waters and in the Chesapeake Bay. It did not have recourse to the Commerce Clause argument put forward by Appellees. But it did, on its own accord, conclude that the area was preempted by federal law, 78 Stat. 194, 16 U.S.C. §§ 1081 et seq.

It is from this judgment that this appeal has been taken.

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

The central issue raised by this appeal is the extent to which the States can safeguard from destruction the fishery stocks within their waters.

Virginia, in common with many other coastal states, has experienced the wholesale destruction of some of her most valuable fishery resources by foreign fishing efforts off her coasts. The river herring industry, once directly supportive of the employment of thousands of Virginians and a healthy fishery resource for more than 100 years, was destroyed in a commercial sense when the Soviet fishing fleet directed its efforts against it. This destruction has occurred, despite treaties governing the taking of fish by foreign interests, because of a lack of concern for long-range conservation of fishery stocks. Disregarding laws and regulations to which they are subject, these foreign interests have "stripped" clean particular stocks of fish and have then moved to other locations and other fishery resources. While highly productive in the short run, this philosophy of fishing has been responsible for major losses to United States fishermen, to the communities in which they live, and to the United States fishing industry. This destruction and this disregard of binding treaties by foreign interests have been amply documented in hearings on the 200 mile limit bill conducted by the Congress in Washington and in many coastal states, including Virginia, compiled in *Hearings on Extending the Jurisdiction of the United States Beyond the Present Twelve-Mile Fishery Zone, Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries,* 93rd Cong. 2nd Sess. (1974). Bills effecting this 200 mile limit have now been overwhelmingly passed by each house of Congress and are now in conference.

Compare the self-interest of a resident Virginia fisherman with a foreign fisherman operating in the Chesapeake Bay or in Virginia's marginal sea. The Virginia fisherman is essentially a day fisherman, returning each night with his catch. He is dependent upon the continued existence of the local fishery stock. His home, processing plants, and other economic and social ties, bind him to an area, and make it imperative that he safeguard the source of his income. Thus, the Virginia fisherman will naturally take a different view toward conserving fishery stocks from the fisherman with no local ties who is merely seeking the most immediately productive method of fishing.

Conservation of fishery stocks must be viewed not only from the natural self-interest of the participants but also from the viewpoint of effective enforcement of fishery regulations. Inspectors can be far more effective against local fishermen, whose fish, nets and crew can easily be examined upon return to local ports, than with respect to non-local fishermen fishing in Virginia waters. Inspection of vessels based outside of Virginia would be dependent upon vessel boarding, a highly ineffective, difficult, and fragmentary surveillance technique.

The General Assembly of Virginia, recognizing the above factors, and having special knowledge of the fishery stocks to be conserved and their geographic locations, has determined that fishing licenses should be issued only to citizens of the United States, and in the case of menhaden fishing in the Chesapeake Bay should be limited to residents of Virginia.

I. The Judgment Below, Insofar As It Rests On The Equal Protection Clause, Would Invalidate Not Only The Statutes Directly In Question Here But Twenty-Seven Statutes Of Twelve Other States And Some Federal Statutes As Well.

The classifications utilized by the Virginia legislature in its effort to protect its fisheries from destruction and which were declared invalid by the three-judge court below are not unique to the Commonwealth of Virginia. Indeed, these classifications exist in many similar state and federal laws dedicated to the same end.

Experience has clearly demonstrated that when it comes to an issue of preservation of natural resources, non-Americans particularly, and non-residents as well, lack the motivation for preserving these resources for future generations. Their behavior has been rather to move into fisheries, take as many fish as possible without regard for the capacity of the fish to reproduce, and then, once the fisheries have been exhausted, to move on to still other waters in order to repeat their depredations. By granting the motion for summary judgment, the court below precluded Appellant from developing these facts. But these facts have caused many jurisdictions in the United States, including the national government, to inhibit the taking of such natural resources by aliens and non-residents. All of these statutes are invalidated by the reasoning of the lower court in finding the Virginia law invalid.

The following states, among others, have laws limiting the issuance of certain licenses to United States citizens: Alaska, Delaware, Massachusetts and Washington.[2] More-

[2] Alaska Rev. Statutes § 16.05.905; Delaware Rev. Statutes, Conservation Law, Title 7 §§ 917, 1115; Massachusetts General Laws, Chapter 130 §§ 38, 55; McKinney's Consolidated Laws of New York, Environmental Conservation Law §§ 13-0335, 13-0341(7); Washington Rev. Code § 75.28.020.

over, Delaware, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington and Wisconsin, among others, have laws favoring residents or excluding non-residents in the issuance of licenses to take certain marine resources from their jurisdictional waters.[3]

Not only does the judgment below invalidate the state laws referred to, but federal statutes as well. Inasmuch as the federal government, like the Commonwealth of Virginia, has classified citizens and non-citizens separately in the regulation of fishing and shipping, and, inasmuch as the standards of the Equal Protection Clause are equally applicable to national laws as state laws, *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), the national laws as well as the state laws would be invalid under the holding of the court below.

Thus, it follows from the trial court's decision that the Congressional choice adopting a classification based upon alienage in 16 U.S.C. § 1081, which was made with an awareness of the Constitutional requirements embodied in the Fifth Amendment, would be invalid. The fact that Congress felt the necessity to distinguish between citizens and aliens in order to conserve and protect fisheries certainly supports the argument that Virginia Code § 28.1-81.1 was necessary to achieve a similar purpose.

Moreover, the definition in the Virginia Law of "citizens of the United States" is identical to that employed by the

[3] Delaware Rev. Statutes, Conservation Law, Title 7 §§ 917, 1115, 1119; Maryland Code §§ 4-618, 4-703, 4-704, 4-805, 4-1003; Massachusetts General Laws §§ 38, 55; Michigan Statutes, Conservation § 308.24; Minnesota Statutes, Game and Fish Laws § 98.46; New Hampshire Rev. Statutes §§ 211:23, 211:62-d; McKinney's Consolidated Laws of New York, Environmental Conservation Law, Title 13 §§ 11-1315, 13-0333, 13-0335, 13-0341(7); Rhode Island Revised Statutes §§ 20-6-1, 20-6-2, 20-12-2; Vermont Statutes, Title 10 § 4608; Washington Revised Code § 75.28.020; Wisconsin Statutes §§ 29.34, 29.343, 29.35.

federal government in numerous laws related to shipping or fishing and making the very classification found invalid by the court below. The definition used in Virginia Code § 28.1-81.1, which embraces the concept of control in the case of corporations, is taken from that set forth in the Shipping Act of 1916, 46 U.S.C. § 802. Similarly it is used in § 2707 of the Merchant Marine Act of 1920, 46 U.S.C. §§ 883, 883-1, to limit the coastwise trade to vessels owned by citizens of the United States. There is an undeniable analogy between participation in coastwise trade and participation in the coastal fisheries. See also the Merchant Marine Act of 1928, 46 U.S.C. § 891u and the Merchant Marine Act of 1936, 46 U.S.C. § 1244.

If the use of citizenship in the above acts is reasonable for federal purposes, it is equally reasonable for the State to use it in a basically similar context.

The court below rested solely on the proposition that classifications of citizens and non-citizens, residents and non-residents were *per se* invalid. It made no effort and refused to receive evidence on the question whether there was a rational or, indeed, a compelling state interest in making the classifications which are and have been so pervasive in this area of fishing rights and coastwise shipping. The reliance of the trial court on the case of *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948) is misplaced. There the law in question singled out a single racial group, the Japanese residents of California. This was not an alienage classification, nor a residency classification, it was a racial classification. And the state could not show that there was any support for a classification that excluded this race from engaging in fishing in California territorial waters when it did not exclude any other alien group in the same manner.

The decision below will wreak havoc among the fishery and shipping laws of many States and the United States, as well as those of Virginia. It rests essentially on a refusal of that court to examine the question of whether there was a sufficient state interest to support the classificaion. It cannot be gainsaid that the question is of such importance that it calls for this Court's judgment as to whether all States and the federal government may continue to use this regulatory means to protect their interests in and to promote the preservation of such vital natural resources as American fisheries.

II. The Judgment Below That The Virginia Laws Have Been Preempted By A Federal Law, Not Directed To The Subject Matter Sought To Be Controlled By The Virginia Laws, Is Inconsistent With This Court's Judgments, With Governing Statutes Of The United States, And With The Legislative Purpose And Intent Of 16 U.S.C. § 1081.

The trial court, without benefit of briefs or arguments directed to the issue, invoked 16 U.S.C. § 1081 to rule that state control over fishing for menhaden in the Virginia territorial waters and Chesapeake Bay had been preempted by national legislation. This conclusion is clearly erroneous. If it were correct, it would result in a large amount of state authority being transferred to exclusive federal control in the face of contrary national legislation and the clear intention of Congress not to bring about such a result.

Regulation of coastal fisheries has long been a matter of joint federal and state control. 16 U.S.C. § 1081 specifically bans the fishing in American territorial waters of non-United States vessels, making the same kind of classification the trial court below found invalid as a violation of the Equal Protection Clause. It also provides an exception to this ban on foreign fishing upon certification by the Secretaries of State and Commerce that such authorization "would be in the national interest," and then only "upon concurrence of

any State, Commonwealth, territory, or possession directly affected." The last phrase makes clear the preservation of the rights of the States in the control of these waters.

In any event, there was no such certificate sought or issued in this case. All that happened was that certain vessels to be operated by Appellees were permitted to be sold to aliens. This hardly can be said to qualify them for fishing rights in Virginia territorial waters. If anything, under § 1081, it disqualified them from such access. But all this is, indeed, beyond the point. For, despite the *ipse dixit* of the trial court, 16 U.S.C. § 1081 did not preempt the authority theretofore clearly recognized as being within the powers of the States. Indeed, the Appellees' application for a license from the Commonwealth of Virginia is confirmation of this understanding.

A. Under The Decisions Of This Court A Federal Law Cannot Be Read To Supplant State Authority Unless By Its Terms Or Of Necessity That Is The Purpose And Effect Of The Federal Law.

This Court has made it abundantly clear that Congressional preemption of state power is not to be presumed, but must be a clear and necessary consequence of the federal action. That principle has been patently rejected by the court below, despite repeated and recent reiterations of the principle by this Court.

In the area of mutual control over ships and waterways, it should suffice at this point to cite *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), where the national enrollment and inspection of a Great Lakes vessel was held not to preempt state law requirements of higher standards of performance, and *Askew* v. *American Waterways Operators,* 411 U.S. 325 (1973), where Florida was allowed to assert authority over oil spills in its territorial waters, in the

face of both the general admiralty jurisdiction of the national government and the Federal Water Quality Improvement Act of 1970. See also, for the controlling general rules about preemption, *Goldstein* v. *California,* 412 U.S. 546 (1973).

B. The Language And The Legislative History Of 16 U.S.C. § 1081 Demonstrate That Congress Did Not Intend To Preempt State Authority In Territorial Fisheries.

We have already referred to the fact that 16 U.S.C. § 1081, by its terms, reaffirmed the joint control over the state territorial fisheries that the trial court would abolish, by its language requiring "concurrence of any State, Commonwealth, territory, or possession directly affected." The legislative history abundantly supports the intention of Congress to leave the state power unaffected. Examples must here suffice.

The Report of the House Committee on the Merchant Marine and Fisheries, H.R. Rep. No. 1356, 88th Cong., 2d Sess. (1963) states:

> It was brought out at the hearings that the powers of the States in dealing with trespassers of their territorial waters would not be preempted by the passage of this bill and for those States already having sanctions, this bill would only supplement existing case law. [2 U.S. Code Cong. & Adm. News 1964, p. 2183.]

The Report of the Senate Committee on Commerce is S. Rep. No. 500, accompanying S. 1988, 88th Cong., 1st Sess., p. 4 (1963):

> This bill will not preempt the states of their powers against trespassers of their territorial seas. Some states now have sanctions, although they often are not as

comprehensive as those which would be effectively supplemented by the proposed bill.

The hearings are replete with support for this conclusion. See, e.g., *Hearings before the House Committee on Merchant Marine and Fisheries, on S. 1988,* 88th Cong., 2d Sess. 64, 81, 130, 139 (1963); *Hearings before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce of the U.S. Senate, on S. 1988,* 88th Cong. 1st Sess. 27, 35 (1962).

The legislative intent is clear. There was to be no preemption of state authority by the enactment of S. 1988. The trial court was plainly in error in assigning such a function to this statute.

C. The Fixed Pattern Of National Legislation Confirms The Authority Of The States In This Area And Clearly Reads Against Any Suggestion Of Preemption.

Unless Congress is to be presumed to have repealed a large part of its own legislation in this area, 16 U.S.C. § 1081 cannot be read to have preempted the authority of the States. We cite only examples of national legislation in support of this point.

Item. Submerged Lands Act, 43 U.S.C. §§ 1301, 1311. § 1311(a):

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in*

> *and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;* [Emphasis added.]

It should be noted that 43 U.S.C. § 1301(e) defines "natural resources" as follows:

> The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and *fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life* but does not include water power, or the use of water for the production of power; [Emphasis added.]

The same section proceeds to define "land beneath navigable waters within the boundaries of the respective states" to include:

> (a)(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such state and to the boundary line of each such state where in any case such boundary as it existed at the time such state became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, . . .

Item: *Contiguous Fisheries Zone Act,* 16 U.S.C. §§ 1091 *et seq.*

§ 1094:

> Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or *as diminishing their jurisdiction to such resources beneath and in the waters of*

the territorial seas of the United States. [Emphasis added.]

Item. *Coastal Zone Management Act,* 16 U.S.C. §§ 1451 *et seq.*

§ 1451(h):

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance. [Magnusson Fisheries Management & Conservation Act of 1976.]

It follows that the trial court judgment holding the power of the States over their territorial waters to have been preempted by the legislation in 16 U.S.C. § 1081 is not only clearly erroneous but of such wide impact to call for its immediate correction by this Court.

CONCLUSION

The judgment of the court below calls for review and reversal by this Court. It has not only invalidated a large number of state and federal laws concerned with limiting access to fisheries to American citizens and residents, it has also ruled that the longstanding joint authority of the States and the national government was implicitly repealed by legislation that neither in fact nor in intent can be read to bring about such a drastic revision of our federal system.

We respectfully submit that this Court should note probable jurisdiction in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION No. 75-69-NN

(Three-Judge Court)

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

FINAL ORDER

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, ADJUDGES, ORDERS and DECREES:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any

of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiff recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION No. 75-69-NN

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

THREE-JUDGE COURT

Argued: October 15, 1975 Decided: November 7, 1975

Before BRYAN, Senior Circuit Judge, KELLAM, District Judge and MacKENZIE, District Judge.

T. H. Willcox, Jr., of Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Virginia, counsel for plaintiffs; James E. Moore, Assistant Attorney General [Andrew P. Miller, Attorney General], Richmond, Virginia, counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three

miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a nonresident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention

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[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 U.S. 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 U.S.C. 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 U.S.C. 2281 and 2284.

[3] There are no critical, genuine factual differences between the parties.

have no place. In other circumstances they are appropriate: to obtain interpretation of a State statute, Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 U.S. 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 U.S. 592, 602 (1975); *Younger, supra,* at 53-54; Zwickler v. Koota, 389 U.S. 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not purposed to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same

licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 U.S. 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi,* supra, at p. 420, and in Toomer v. Witsell, 334 U.S. 385, 401 (1948) declined to treat, as *contra,* McCready v. Virginia, 94 U.S. 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . .", except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 U.S. 385, 393, 394 (1948); United States v. California, supra, 332 U.S. 19 (1947); Skiriotes v. Florida, 313 U.S. 69, 75 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 U.S.C. 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 U.S.C. 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-miles sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester,* supra —determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to

be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 U.S. 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 U.S. 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

APPENDIX B

Supremacy Clause, U.S. Const. art. VI, ¶ 2

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Equal Protection Clause, U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 U.S.C. § 1081

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States

is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Nothwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Va. Code § 28.1-60

Non-residents generally.—(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation *may* take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Va. Code § 28.1-81.1

Licenses for taking fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of

its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

APPENDIX C

STATEMENT BY AMMON G. DUNTON, JR., ESQUIRE, BEFORE THE SENATE COMMITTEE ON AGRICULTURE, CONSERVATION, AND NATURAL RESOURCES

January 27, 1975

Mr. Chairman, members of the Committee, I am Ammon G. Dunton, Jr., a member of the firm of Dunton, Simmons & Dunton. We act as counsel for Zapata Haynie Corporation, a Virginia corporation and a major participant in the American menhaden fishing industry.

I assisted Senator Manns in the drafting of S.B. 941. It has been reviewed by Commissioner Douglas, who is here to testify in support of this legislation.

The bill would prohibit the licensing of foreign nationals (whether they be acting as individuals, partners, or controlling elements of corporations) from engaging in the taking of commercial fish from the waters of the Commonwealth.

Paragraph (a) of the first section of the bill sets forth the words of prohibition, and the fact that the requirement that licenses be granted only to U.S. citizens does not eliminate any other requisite to the issuing of licenses as required by the Code.

Paragraph (b) defines a corporation deemed a U.S. citizen.

Paragraph (c) sets forth provisions designed to eliminate evasion of the 75% ownership requirement. These are taken from the federal Shipping Act of 1916 definition of corporate citizen, which has been found to be effective through the years.

Section 2 of the bill declares an emergency to exist.

Evidence taken around the country in the hearings on the 200 mile limit bill now pending before the Congress in

Washington has established that American fisheries should be reserved for American citizens because they alone have the true incentive to conserve and maintain our domestic fishery resources. The American fishing industry, particularly the menhaden segment, has exhibited a fiduciary quality with respect to the management of its fishing effort. American menhaden companies have assisted in studies regarding the life cycle and movement of menhaden and have responded to requests from the National Marine Fisheries Service for reduction in fishing efforts in certain years. As a result the present menhaden stocks are relatively plentiful in areas where foreign fishing has not interfered with the resource, such as in the Chesapeake Bay and in portions of the Gulf of Mexico. On the other hand, where foreign vessels have harvested unknown amounts of unknown species, which we suspect include substantial quantities of menhaden, large scale reductions in the availability of fish have occurred. It is, I believe, fair to say that these foreign vessels are not motivated by a desire to preserve fishing stocks, but instead engage in "strip fishing" which produces large short-term profits but destroys the resource.

The present law in Virginia, contrary to most impressions, does not reserve our domestic fisheries resource to U.S. citizens in all cases.

The simplest means by which foreign owners can fish within Virginia waters is to acquire a Virginia corporation having American documented vessels. While it is true that foreign built or documented vessels will not be permitted to fish within Virginia waters, foreign owned American vessels can.

Within the past few months the control of approximately one-third (⅓) of the American menhaden vessels has passed to foreign interests; and despite objections raised by other American participants, unconditional approvals of

these sales were granted by the present Administration in Washington, ostensibly because there were no clear federal legislative provisions to the contrary. Similarly, a major portion of the American salmon fleet on the west coast has recently been acquired by Japansese interests, in that instance without so much as a hearing being permitted in order to allow American industry to object. The transactions I have referred to are the sale of the Smith group of companies to Hanson Trust and the sale of Whitney-Fidalgo Seafoods, Inc. to Kyokuyo Ltd. of Japan. These two unconditional sales to foreign interests (although conditions might have been imposed by the Maritime Administration) have allowed substantial foreign entry into the American fishery itself for the first time. Here in Virginia, I understand Japanese investment has been made in the lobster industry. Furthermore, these foreign interests can expand their position almost without limit, and can profit from the transactions by disposing without notice to anyone of their stock investments to other foreign interests who then will also have established positions within the American fishery.

As an example, I will give you a hypothetical situation which could occur under existing federal and Virginia law as it is presently being interpreted by the administrative agencies involved. Hanson Trust, through intermediary American corporations, has acquired sixty-eight American menhaden vessels licensed for use in the American fishery. If Hanson should retain approximately one-half of the vessels for its own use, as it has stated it intends to do, it could sell the stock of a corporation owning the balance of vessels to a company controlled by, for instance, Russians. The Russians, in turn, could fit the vessels out for fishing and enlarge them if they saw fit, and fish with impunity within the Chesapeake Bay.

It is true that American masters and watch officers must be in charge of the vessels and the vessel owning corporation would need some American nationals as officers and directors; but it is quite possible to find American citizens who are willing to serve in these capacities if sufficient compensation is paid. Also, theoretically, it is true that the same laws affecting the taking of fish by Americans would apply to the Russian operators. In point of fact, enforcement of fishing laws and regulations would be difficult in the face of any determined effort to overfish by any particular organization.

The practical answer to the problem is to adopt legislation clearly prohibiting the issuance of licenses for the taking of commercial fish from Virginia waters if the persons to whom the licenses would be issued are controlled, directly or indirectly, by foreign nationals. The enactment of such legislation would implement the long standing federal and state policy of reserving the American fisheries for American citizens.

I strongly urge the adoption of S.B. 941 on an emergency basis.

I thank you for the opportunity to appear before you today and to present these comments.

APPENDIX D

ZAPATA HAYNIE CORPORATION
STATEMENT BY ALLEN W. HAYNIE, PRESIDENT OF ZAPATA HAYNIE CORPORATION, BEFORE THE HOUSE OF DELEGATES COMMITTEE ON THE CHESAPEAKE AND ITS TRIBUTARIES

February 14, 1975

Mr. Chairman, members of the Committee, I am Allen W. Haynie of Reedville, Virginia, and I serve as President of Zapata Haynie Corporation. I am grateful for this opportunity of appearing today to present my views and support of Senator Mann's Bill to restrict the issuances of licenses for the taking of commercial fish to the citizens of the United States.

Our company is a part of the menhaden industry. Our plants are located on the Atlantic and Gulf coasts and we produce fish meal, fish oil, and condensed and/or dried fish solubles

The menhaden fishing fleet in the United States numbers approximately 125 to 140 vessels which range in size from 140 to 185 feet in length. They carry a crew of 17 men each and together with supporting processing plant and shore-side crews, the industry's employment totals between 5,000 to 6,000. Our company operates 36 vessels, 25 airplanes, 5 plants and employs about 1,300 people of which approximately half are Virginians.

In addition to our menhaden operation, our company previously conducted operations in the river herring fishery until the resource was destroyed by foreign off-shore fishing. We dismantled our plant, sold our equipment and vessels, and discontinued operations some months ago.

Dr. Jackson Davis of the Virginia Institute for Marine Science states, in one of his reports to our trade association

about 1965, that the river herring resources had remained in a very healthy and stable condition for about 100 years, and was perhaps the most stable resource along the Atlantic coast. It was about 1966 that the foreign off-shore fishing fleets began to operate south of Ocean City, Maryland; and I personally stated at that time to Ambassador Donald McKernan, who was Special Assistant for Fisheries to the Secretary of State, that if this great foreign fleet continued to fish on the river herring resource, it would be extinct within 5 years. Several bi-lateral agreements negotiated by our State Department made very feeble and non-productive attempts to discourage foreign fishing of this resource, and as stated earlier, it no longer exists in quantities justifying commercial ventures of any size. Because of this, our canning operation, which was established at Mundy Point, Virginia, to process river herring in 1880, has been closed. It employed 300 persons in 1965. (Attachment A—Chesapeake Fisheries Historical Catch Statistics, Alewives, 1880-1972).

It is our opinion that due to inadequate government surveillance, we are unable to determine the extent to which foreign fishing has affected our menhaden resource. A very large Russian purse seine fleet has been developed and has been operating on the Atlantic during the past 3 years. (Attachment B—National Marine Fisheries Service Surveillance Report). This new purse seine capacity of the Russians, employing large vessels capable of operating the largest kind of purse seines, is perhaps as great, if not greater, than that of the entire U.S. menhaden fleet.

For the last 50 years very large schools of menhaden have migrated from the northeast, the Jersey coast and the Chesapeake Bay south to the Carolinas, where a fishery had been successfully conducted during November and December in the Beaufort-Morehead City, North Carolina area. While some say it is merely a coincidence, I believe that the existence of this Russian purse seine fleet is the reason that the fish have not reached North Carolina in commercial quantities during the past 3 years. The Russian seiners operate in the migratory path of the menhaden. Where there were 5 plants operating in North Carolina in the 1960's, only 1 now continues and this on a small scale.

Although foreign fishing effort has seriously depleted marine resources beyond our territorial sea, such foreign effort has not yet been undertaken in substantial quantity within our territorial waters or the Chesapeake Bay. It has come to our attention that by means of the use of a shell corporation owned entirely by foreign nationals and the use of American flag vessels, foreign interests can, if they so desire, fish within the Chesapeake Bay and within the territorial waters of this Commonwealth. I feel that any such foreign fishing effort within our waters would be seriously detrimental to the interests of the citizens of this country and this state. I feel that this loophole should be closed by appropriate emergency legislation.

In my opinion, the United States has become a second-class fishery nation which, to a great extent, is a result of this unwarranted foreign destruction of fisheries off our coast. In excess of 75% of the fin fish caught off our coast are caught by foreign fishermen. Only 25% is still controlled by U.S. fishermen. Menhaden represents more than 40% of the total tonnage of fin and shell fish landed by U.S. fishermen.

Therefore, after giving this matter serious deliberation, I urge your support and passage of this vital legislation.

ATTACHMENT A

SUMMARY OF THE MENHADEN FISHERY, 1873-1972

Year	Plants	Fish Received	Year	Plants	Fish Received
	Number	Thousand Pounds		Number	Thousand Pounds
1873	62	266,459	1910	(1)	(1)
1874	64	339,228	1911	(1)	(1)
1875	60	377,429	1912	48	711,435
1876	64	343,342	1913	(1)	(1)
1877	56	393,720	1914	(1)	(1)
1878	56	514,412	1915	(1)	(1)
1879	60	426,833	1916	(1)	(1)
1880	79	520,506	1917	(1)	306,146
1881	97	304,309	1918	(1)	259,292
1882	97	232,248	1919	(1)	438,520
1883	78	411,019	1920	(1)	(1)
1884	52	575,257	1921	40	691,132
1885	50	321,074	1922	45	812,342
1886	26	189,681	1923	50	743,895
1887	28	223,488	1924	45	344,284
1888	24	294,391	1925	43	532,118
1889	29	372,064	1926	41	382,781
1890	28	357,570	1927	39	392,763
1891	27	237,943	1928	34	362,213
1892	29	149,828	1929	37	442,443
1893	33	245,492	1930	33	409,513
1894	44	357,352	1931	27	236,432
1895	42	309,370	1932	24	375,479
1896	35	268,955	1933	30	357,726
1897	41	391,483	1934	27	517,403
1898	40	363,475	1935	27	434,386
1899	(1)	(1)	1936	29	516,104
1900	(1)	(1)	1937	32	529,202
1901	36	609,744	1938	32	517,530
1902	(1)	(1)	1939	33	574,825
1903	(1)	(1)	1940	30	634,589
1904	(1)	(1)	1941	29	775,087
1905	(1)	(1)	1942	30	482,644
1906	(1)	(1)	1943	25	615,554
1907	(1)	(1)	1944	27	685,980
1908	(1)	(1)	1945	24	759,074
1909	(1)	(1)	1946	28	916,013

(1) Data not available.

Year	Plants	Fish Received	Year	Plants	Fish Received
	Number	Thousand Pounds		Number	Thousand Pounds
1947	31	948,156	1960	38	1,999,036
1948	31	1,007,889	1961	35	2,290,936
1949	31	1,072,630	1962	33	2,227,316
1950	35	1,000,498	1963	32	1,787,638
1951	35	1,103,915	1964	31	1,530,631
1952	40	1,386,281	1965	33	1,651,022
1953	36	1,683,406	1966	33	1,275,623
1954	34	1,740,600	1967	32	1,133,254
1955	35	1,848,299	1968	29	1,343,902
1956	38	2,076,588	1969	(1)	1,516,292
1957	41	1,681,580	1970	(1)	1,731,179
1958	38	1,544,683	1971	(1)	2,149,973
1959	40	2,193,864	1972	(1)	1,870,372

CHESAPEAKE FISHERIES HISTORICAL CATCH STATISTICS

ALEWIVES, 1880-1972

(Thousands of Pounds)

Year	Maryland Quantity	Virginia Quantity	Total Quantity
1880	9,204	6,925	16,129
1887	11,062	4,402	15,464
1888	11,512	6,453	17,965
1890	19,767	10,642	30,409
1891	17,419	11,013	28,432
1896	17,667	12,198	29,865
1897	17,139	13,690	30,829
1901	13,747	13,914	27,661
1904	14,485	14,604	29,089
1908	28,805	37,885	66,690
1909	23,637	27,788	51,425
1915	12,568	16,054	28,622
1920	7,072	16,665	23,737
1921	6,505	18,834	25,339
1925	7,701	17,910	25,611
1929	5,924	12,570	18,494
1930	5,741	15,387	21,128
1931	7,827	17,239	25,066
1932	7,553	13,852	21,405
1933	6,550	19,177	25,727
1934	5,234	5,846	11,080
1935	4,229	10,974	15,203
1936	3,369	8,689	12,058
1937	3,819	15,064	18,883
1938	5,397	17,691	23,088
1939	4,398	14,831	19,229
1940	4,679	11,433	16,112
1941	5,061	11,951	17,012
1942	3,422	9,258	12,680
1944	3,504	17,841	21,345
1945	2,584	14,619	17,203
1946	3,497	12,029	15,526
1947	2,746	22,173	24,919

Year	Maryland Quantity	Virginia Quantity	Total Quantity
1948	3,720	19,365	23,085
1949	4,965	22,003	26,968
1950	5,926	28,702	34,628
1951	6,752	32,604	39,356
1952	4,494	28,841	33,335
1953	4,653	23,976	28,629
1954	3,981	27,930	31,911
1955	5,145	21,843	26,988
1956	5,026	22,107	27,133
1957	3,410	18,758	22,168
1958	4,391	18,361	22,752
1959	4,484	17,447	21,931
1960	3,525	15,464	18,989
1961	2,444	15,526	17,970
1962	2,378	25,300	27,678
1963	1,466	26,085	27,551
1964	1,314	26,640	27,954
1965	2,092	36,200	28,292
1966	1,433	28,535	29,968
1967	2,337	28,107	30,444
1968	3,963	32,319	36,282
1969	3,458	30,446	33,904
1970	2,065	19,046	21,111
1971	2,811	10,285	13,096
1972	1,690	10,451	12,141

ATTACHMENT B

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Provincetown, Massachusetts 02657

Date: June 20, 1973
To: Chief, Division of Enforcement and Surveillance, NMFS, Gloucester, Mass.

From: Alan F. Mager, Fisheries Enforcement Agent
Subject: Enforcement and Surveillance Flight—June 19 1973

On June 19, 1973 an enforcement and surveillance flight was conducted in cooperation with the United States Coast Guard Air Station, Cape Cod, Bourne, Massachusetts by Fisheries Enforcement Agent Alan F. Mager.

The flight was conducted after dark and had a twofold purpose: (1) to obtain information regarding the activity of a large fleet of Soviet purse seiners operating near the northern edge of Georges Bank, and (2) to conduct a surveillance of the contiguous fishing zone between Cape Cod and Portland, Maine. Flight conditions were excellent with 20-25 mile visibility under clear to partly cloudy skies. Seas were exceptionally calm.

The fleet of Soviet purse seiners was located at about 9:30 PM (EDT) just north of the northern edge of Georges Bank. The fleet numbered approximately *90 vessels,* counting both support vessels and seiners. When sighted, *about 80% of the seiners were actively fishing, confirming previous suspicions that this was primarily a nighttime fishery. Large amounts of fish were observed aboard two support vessels, but could not be identified by species due to poor lighting.*

On the contiguous zone patrol, a group of 6 fishing vessels was sighted on Jeffreys Ledge. The group included *3 large stern trawlers (probably East German)* and 3 small

side trawlers (probably United States). Positive identification could not be made because glare from the vessels' lights made it impossible to see names, numbers or even stack markings.

Fishing Vessel Sightings
June 19, 1973

Position # 1 3 miles to either side of a line between 42°20′N., 68°00′W. and 42°15′N., 67°10′W.

93 to 127 miles east-northeast/Cape Cod.

Approximately 80 Soviet purse seiners, mostly of the SRTR class, but also including some SRTK's, were sighted along with at least 8 support vessels of which at least 6 were of the factory base type.

About 80% of the fishing vessels had their purse seines deployed when sighted. *No fish were sighted on any of the seiners,* but large amounts of fish were observed in holding bins on the decks of two of the support vessels. Lighting conditions did not permit identification of the species. Other support vessels had great heaps of barrels on their decks.

Several of the seines observed had attached to them a raft-like object about 8-10 feet in diameter which displayed a single red light. This object was attached to the middle of the net's floating line and thus marked the outer limit of the net when fully deployed.

Observance of international rules of the road for fishing vessels regarding fishing lights was not uniform among these seiners. Many displayed the required red-over-white lights for purse seiners. Many others, though actively seining, displayed the green-over-white lights required for trawlers. Still others showed neither of these signals.

Position # 2 43°08′N., 70°02′W. (4-mile radius) 22 miles southeast/Cape Porpoise, Maine.

In this position, 3 large stern trawlers and 3 small side trawlers were sighted. Because of lighting conditions, no names, numbers or other identifying marks could be seen on these vessels. Judging from size, color and design, the three stern trawlers were probably East German and the three side trawlers, United States.

Trawl warps extending from the rear of all three stern trawlers were plainly visible, but the activity of the smaller vessels could not be determined.

TABLE 1—FOREIGN FISHERY VESSELS OPERATING OFF U.S. COASTS DURING MAY 1973; (EXCLUDING DUPLICATE SIGHTINGS); BY TYPE OF VESSEL AND COUNTRY

Fishing grounds	Stern[1] trawlers	Medium[2] trawlers	Other fishing vessels	Processing and transport vessels	Support vessels[3]	Research vessels[4]	Totals
Off Pacific coast:							
Off Alaska:							
Japan	32	119	222	28	—	2	403
Soviet Union	16	57	—	10	2	2	87
Republic of Korea	3	4	1	2	—	—	10
Total	51	180	223	40	2	4	500
Off Pacific Northwest:							
Japan	1	—	1	—	—	—	2
Soviet Union	38	19	—	5	4	2	68
Other	—	—	—	—	—	—	—
Total	39	19	1	5	4	2	70
Off California:							
Soviet Union	26	4	—	2	1	2	35
Japan	—	—	—	—	—	—	—
Total	26	4	—	2	1	2	35
In the Gulf of Mexico:							
Mexican	—	—	—	—	—	—	—
Cuban	—	—	11[5]	—	—	—	11
Soviet	—	1	—	—	—	—	—
Japanese	—	—	—	—	—	—	—
Other	—	—	—	—	—	—	—
Total	—	1	11	—	—	—	12
Off Atlantic coast:							
Soviet Union	63	95[6]	—	14	2	—	174
Poland	18	12	—	2	—	—	32
East Germany	6	11	—	3	—	—	20
Federal Republic of Germany	—	—	—	—	—	—	—
Bulgaria	4	—	—	—	—	—	4
Rumania	3	—	—	—	—	—	3
Spain	5	2	—	—	—	—	7
Japan	2	—	—	—	—	—	2
Italy	—	—	—	—	—	—	—
Norway	—	—	—	—	—	—	—
Canada	—	—	—	—	—	—	—
Other (French)	—	—	—	—	—	1	1
Total	101	120	—	19	2	1	243
Grand total	217	324	235	66	9	9	830

[1] Includes all classes of stern factory and stern freezer trawlers.
[2] Includes all classes of medium side trawlers (nonrefrigerated and refrigerated, and freezer trawlers).
[3] Includes fuel and water carriers, tugs, cargo vessels, et cetera.
[4] Includes exploratory, research, and enforcement (E) vessels.
[5] Lambda shrimp trawlers.
[6] Of a total 95 medium side trawlers, 51 were rigged as purse seiners.

Supreme Court, U. S.
FILED
MAR 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees.

BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

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No. 75-____

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SEACOAST PRODUCTS, INC., ET AL.,

Appellees.

BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

INTERESTS OF AMICUS CURIAE

Maryland and Virginia share probably the most unique estuary in the world, the Chesapeake Bay. This body of water is the producer of vast amounts of seafood which exist in the form of shellfish and various finfish species. The amount that is harvested impacts upon a great number of supportive services and industries, which in turn affects the well being of the citizens of both States. Food fish production in the Bay depends upon the availability of certain fish species which spend part of their time in the territorial seas offshore Maryland and Virginia. For instance, menhaden, the subject of this litigation, are locally known

as alewives, bunkers, pogies and big eyes, and are the basic staple forage fish in the waters of the Chesapeake Bay and the nearby waters of the Atlantic Ocean. It is a basic biological principle that certain support and food fish species, such as striped bass, blue fish, and weakfish (sea trout), depend upon menhaden for their basic nutritional requirements.

The upper Chesapeake Bay and the inshore bays of the Atlantic Ocean constitute the largest single menhaden nursery area on the Atlantic coast. Therefore, the overharvesting of the menhaden would result in a direct reduction of marketable finfish within the Chesapeake Bay.

Although the value of fish as a food has risen in most drastic terms recently, a review of the pounds harvested indicates the serious need for strong conservation and management techniques. For instance, in 1955, 18,352,000 pounds of finfish were landed in Maryland. Landings reached an all-time high in 1965 with more than 35 million pounds landed, but since that time, because of increased market pressures and other factors, landings have dwindled to a low point of 14,915,000 pounds in 1975.

Historically, Maryland has attempted to limit its commercial fisheries to residents of the State.[1] The pressures upon the commercial fishery industry have been heightened in recent years. The Bay is the involuntary recipient of streams of urban runoff, by-products of development, and also receives its pollution

[1] For instance, §4-703 of Natural Resources Article, Annotated Code of Md. (1974 Vol. and 1975 Supp.), which prohibits nonresidents from catching finfish by net, was originally enacted by Chapter 67, Maryland Laws of 1842; §4-1003 of the Natural Resources Article, which limits commercial taking of oysters and clams to Maryland residents,

load from sewage treatment plants and industrial effluents. Great strides have been made to reduce these forces, but the availability of fish for use as a protein foodstuff has also resulted in increased and more efficient methods of harvesting. Maryland recognizes the absolute necessity to preserve and manage the fisheries in order to maintain the Bay as a highly productive estuary. Maryland files this brief, therefore, in strong support of the jurisdictional statement of Virginia.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on 7 November 1975. Copies of the opinion and final order are attached hereto as Appendix A.

JURISDICTION

The opinion of the three-judge District Court was entered on November 7, 1975. Appellant filed notice of appeal on January 5, 1976 in U.S. District Court for the Eastern District of Virginia. The jurisdiction of the Supreme Court to review this decision by appeal is pursuant to 28 USC §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause,

originated through Chapter 292, Maryland Laws of 1854; §4-704 of the Natural Resources Article, which requires that an applicant for a commercial net fishing license be either a lawful resident of the State or a landowner, was first enacted through Chapter 441, Maryland Laws of 1896; §4-805 of the Natural Resources Article, which prohibits nonresidents from catching crabs for commercial purposes, had its beginning through Chapter 544, Maryland Laws of 1916.

Article VI, ¶2 and the Equal Protection Clause, Amendment XIV, §2. The statutory provisions are 16 U.S.C. §1081, 43 U.S.C. §1301 et seq. and Virginia Code §§28.1-60 and 28.1-81.1. These statutes and provisions are set out in full in Appendix B.

QUESTIONS PRESENTED

1. May a state, in order to conserve and maintain a viable commercial fishery, limit commercial harvesting on a residential or non-alien basis?

2. Does 16 U.S.C. §1081 preempt the Virginia Statutes enacted under the police power to manage and protect a fishery resource, part of which is wholly within the inland waters of the state?

STATEMENT

The state of Maryland adopts the statement of the case contained within the brief of Appellant.

THE QUESTIONS ARE SUBSTANTIAL

The substantiality of a constitutional claim is no longer questioned merely because it is joined with a preemption challenge, as in the instant case. *Florida Lime & Avacado Growers v. Jacobsen*, 362 U.S. 73 (1960); *see also Kesler v. Department of Public Safety*, 369 U.S. 152 (1962).

At stake in this case is the ability of a state to manage and conserve resources totally within its boundaries by a particular method. That method may entail restrictions of nonresidents from commercial fishing both within the inland waters of the state and also in the territorial sea.[2] It is generally recognized

[2] The term "territorial sea" is used herein to define the 3-mile zone offshore the Atlantic coast. This area is also known as the "marine belt", "marginal sea" and "3 mile limit". The landward limit of this zone is coterminous with the seaward limits of inland waters. Shalowitz, *Shore and Sea Boundaries* Vol. 1, p. 23.

that a proper and necessary function of the police power is to provide protection to the fishery resources in the state. *See Maryland Dept. of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1066 (D. Md. 1972); *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957), Aff'd. 355 U.S. 37 (1957) (*per curiam*); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 266 Md. 358 (1972).

A vital element of a state's action to restrict commercial fishery in the territorial seas is the relation of that restriction to the enhancement and management of the fishery within the state's inland waters. This is the case here for what is harvested in the territorial sea directly effects what is spawned, nurtured, and matures within the waters of the Chesapeake Bay.

The Court below did not attempt to distinguish the role of a coastal state in protecting its fishery resources in inland waters as distinguished from the territorial sea. *McCready v. Virginia*, 144 U.S. 391 (1877), has survived because that distinction has been sustained by this Court.

I.

WHETHER THE COMMONWEALTH OF VIRGINIA CAN PROTECT ITS FISHERY RESOURCES FROM THE PRESSURES OF OVERHARVESTING BY USING DIFFERENT COMMERCIAL FISHERY CLASSIFICATIONS FOR RESIDENTS, NONRESIDENTS AND ALIENS.

Basic self-interest leads an individual to take as much as possible from a resource before another individual arrives at that same resource. *See* G. Harden, "The Tragedy of Commons", *Science Magazine*, Dec. 13, 1968, at 1243-48. Gradually this activity results in the

loss of a resource. To counter against this, the regulator or proprietor of the resource should be permitted to classify the exploiter on the basis of his interest in conserving and maintaining a given resource. It is unquestioned that a local fisherman, possessing local, geographical community responsibilities has a greater interest in maintaining a stable and consistent resource. This fact is implicit in H.R. 200, 94th Cong., 1st Sess. (1976), reported out of the Joint Senate/House Conference on March 17, which would authorize the imposition of a 200 mile jurisdictional limit for United States fisheries in 1977.

Query: if the Federal government can legitimately seek to exclude alien vessels from the 200 mile zone as a means to manage the fishery resource, why is not the same procedure available to the states?

Recently the United States District Court for Maine was presented with a similar question. At issue was the constitutionality of a Maine statute which would prohibit the issuance of a lobster or crab commercial fishing license to one who had not been a resident of Maine for at least three years, and who had not remained in the physically in the state of Maine for at least eight months of each year. The Court struck down the three year durational requirement upon the basis that that type of invidious distinction had no rational basis and was not related to the protection of the resource. The Court simply stated that there was no rational basis for distinguishing between old and new residents. *Massey v. Apollonio,* 387 F. Supp. 373 (D. Me. 1974). The Court refused, however, to hold that the residence requirements should also fall. *Id.* at 377.

The basic test in determining whether a law is violative of equal protection, is whether or not the

chosen classification is without any reasonable basis to the end it seeks to serve. *See McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101 (1961). Identification of the "reasonable basis" has also been the focal point of the "due process" decision recently issued by this Court in *North Dakota Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973). This case specifically overruled *Liggett Co. v. Baldridge,* 278 U.S. 105 (1928) and upheld a North Dakota statute which required that a majority of stock of a corporate applicant have a permit to operate a pharmacy must be owned by a registered pharmacist responsible for the management and operations of the pharmacy. In overruling *Liggett,* this Honorable Court declared:

> "The majority of the Court in *Liggett* for which Mr. Justice Sutherland spoke held that business or property rights could be regulated under the Fourteenth Amendment only if the 'legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare,' 278 U.S. at 111-112, 73 L. Ed. 204 . . . . The opposed view stated by Mr. Justice Holmes, and concurred in by Mr. Justice Brandeis, was:
>
> > '. . . The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.' *Id.*, 114-115, 73 L. Ed. 204.
>
> "Those two opposed views of public policy are considerations for the legislative choice. The *Liggett* case was a creation at war with the earlier constitutional view of legislative power, *Munn v. Illinois,* 94 U.S. 113, 132, 134, 24 L. Ed. 77, and opposed to our more recent decisions. *Olsen v. Nebraska,* 313 U.S. 236, 241, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A.L.R. 1500; *Williamson v. Lee Optical*

> *Co.*, 348 U.S. 483, 487-488, 99 L. Ed. 563, 75 S. Ct. 461; *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 96 L. Ed. 469, 72 S. Ct. 405, as well as the *Daniel, Lincoln Union*, and *Ferguson* cases already discussed. The *Liggett* case, being a derelict in the stream of the law, is hereby overruled. We reverse and remand the judgment below and free the courts and agencies of North Dakota from what the State Supreme Court deemed to be the mandate of *Liggett." North Dakota, supra* at 166-67.

The Court should honor the presumption that the State legislature has passed a constitutional statute in proscribing certain activities. The Honorable Chief Justice observed in a recent obscenity case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1974), as follows:

> ". . . It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional cases where that legislation plainly impinges upon rights protected by the Constitution." 413 U.S. at 60.

Illustrating this principle, the Chief Justice stated:

> ". . . when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area." See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-420, 91 S. Ct. 814, 824-826 (1971). *Id.* at 62.

Toomer v. Witsell, 334 U.S. 385 (1948) departed from *McCready v. Virginia, supra*, but did not overrule it. The Court held that the privilege of nonresidents in the State of South Carolina to engage in the business of commercial shrimping in the three-mile belt offshore South Carolina was a privilege and immunity of citizenship protected by Article IV, §2 of the United

States Constitution which required "substantially equal" treatment of nonresident commercial fishermen as that accorded resident commercial fishermen. This case was decided shortly after this Court's decision in *U.S. v. California*, 332 U.S. 19 (1947), which held that California did not own the waters offshore its coast nor have a proprietorship interest in the natural resource located therein. This lack of a proprietorship interest was recognized in *Toomer:*

> The fact that it is activity in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownership doctrine. While *United States v. California*, 332 U.S. 19 (1947), as indicated above, does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired "ownership" of the three-mile belt. *Id.* at 402.

The Court then distinguished *McCready* on two counts:) that the *McCready* opinion dealt with sedentary shellfish as compared to the free-swimming shrimp which migrate through the waters of several states; and 2) *McCready* dealt with the regulation of fishing in inland waters as compared to shrimping in the territorial sea.

Arguably *Toomer* would have been decided differently if it surfaced subsequent to the enactment of the Submerged Lands Act in 1953, 43 U.S.C.A. §1301 *et seq.* This Act conferred, confirmed and established the management and use of the submerged lands and natural resources into the respective coastal states and, therefore, serves as a jurisdictional basis for the assertion of State prerogative with the three-mile belt. *See also State v. Norton*, 335 A.2d 607 (S. Ct. Me. 1975).

II.

WHETHER 16 U.S.C. §1081 PREEMPTED STATE REGULATION OF FISHERIES IN THE TERRITORIAL SEAS.

16 U.S.C. §1081 prohibits all non-United States vessels from engaging in fisheries within the territorial waters of the United States. This section further provides a method for the Secretary of the Treasury to issue exemptions to the broad proscription upon certain conditions. The language is negative in nature, the only affirmative act assumed by the Federal government is to grant the exceptions to the prohibition.[3] The intent expressed for the Federal government to authorize which in fact would authorize non-United States vessels into this three-mile wide belt.

Clearly passage of the Submerged Lands Act of 1953, 43 U.S.C. §1301 *et seq.*, was an affirmative indication that the states were to assume and perpetuate management prerogatives in this zone. 16 U.S.C. §1081 does not really address the scope of the Submerged Lands Act and clearly there is no expression of legislative intent to impliedly repeal or amend the Act.

If a coastal state does not encroach upon the Federal sphere of influence, i.e. the authorization of exemptions to alien vessels, the state action should be sustained. *See Askew v. American Waterway Operators*, 411 U.S. 325 (1973); *see also Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851).

[3] This act further provides, within §1091, the assumption by the Federal government of certain responsibilities within the contiguous zone extending from 3 miles to 12 miles into the ocean. *See U.S. v. F/V Taiyo Maru No. 28 S01-600*, 395 F. Supp. 413 (D. Me. 1975).

CONCLUSION

The issues presented to this Court clearly transcend their application to the parties involved. If the District Court opinion stands, it would invalidate the natural resources management laws of many States, affecting not only fisheries, but wildlife management regulations as well. This Court should define the distance a state may traverse in order to protect its natural resources. For instance, in order to accomplish this task, can a state place nonresidents in a category different from residents? Should a state classify waters wholly within its boundaries differently from those within the three-mile territorial sea?

We respectfully request that this Court note probable jurisdiction in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION No. 75-69-NN

(Three-Judge Court)

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

FINAL ORDER

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, ADJUDGES, ORDERS and DECREES:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any

of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiff recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION No. 75-69-NN

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

THREE-JUDGE COURT

Argued: October 15, 1975 Decided: November 7, 1975

Before BRYAN, Senior Circuit Judge, KELLAM, District Judge and MacKENZIE, District Judge.

T. H. Willcox, Jr., of Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Virginia, counsel for plaintiffs; James E. Moore, Assistant Attorney General [Andrew P. Miller, Attorney General], Richmond, Virginia, counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three

miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention

[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 U.S. 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 U.S.C. 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 U.S.C. 2281 and 2284.

[3] There are no critical, genuine factual differences between the parties.

have no place. In other circumstances they are appropriate: to obtain interpretation of a State statute, Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 U.S. 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 U.S. 592, 602 (1975); *Younger, supra*, at 53-54; Zwickler v. Koota, 389 U.S. 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not purposed to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same

licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 U.S. 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi*, supra, at p. 420, and in Toomer v. Witsell, 334 U.S. 385, 401 (1948) declined to treat, as *contra*, McCready v. Virginia, 94 U.S. 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . .", except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 U.S. 385, 393, 394 (1948); United States v. California, supra, 332 U.S. 19 (1947); Skiriotes v. Florida, 313 U.S. 69, 75 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 U.S.C. 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 U.S.C. 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-miles sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer*, *California*, *Skiriotes* and *Manchester*, supra—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to

be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 U.S. 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 U.S. 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

APPENDIX B

Supremacy Clause, U.S. Const. art. VI, ¶ 2

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Equal Protection Clause, U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 U.S.C. § 1081

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States

is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Va. Code § 28.1-60

Non-residents generally.—(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation *may* take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Va. Code § 28.1-81.1

Licenses for taking fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of

its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., and SECOND OCEANIC CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF NEW YORK STATE AS *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF NEW YORK STATE AS *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

Interest of *Amicus Curiae*

The State of New York claims ownership of the fish in its waters for purposes of regulation and control.* Along with

* Environental Conservation Law § 11-0105

"The State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition."

favor or

other coastal states, New York regulates commercial fishing in the waters off its coast. There are a number of State laws which limit fishing to residents of the state, Environmental Conservation Law §§ 13-0311 (shellfish diggers), 13-0313 (shellfish growers), 13-0315 (shellfish shippers and processors), 13-0329 (lobsters), 13-0331 (crabs), 13-0333 (menhaden) and to citizens who are residents of the state, Environmental Conservation Law §§ 13-0335 (food fish), 13-0341(7) (beam and other trawls).* Copies of these statutes are annexed hereto as Appendix A.

If the decision of the lower court is upheld, it will not only place the legality of these statutes in jeopardy, but will also endanger the historical management of fishing by New York and the other affected states in their coastal waters, endangering stocks of fish on which thousands of New Yorkers depend for a livelihood and many more for a source of food. New York like Virginia has a large body of inland water, Long Island Sound, as well as many bays which may be affected by this decision. These coastal areas are prime sources of food fish and shellfish.

Opinion Below

The opinion below was entered by a three-judge court for the Eastern District of Virginia on November 7, 1975. It is not yet reported.

which favor or limit in terms of

* Some other state statutes ~~requiring~~ residency or citizenship are: Alaska Rev. Statutes § 16.05.905; Delaware Rev. Statutes, Conservation Law, Title 7 §§ 917, 1115, 1119; Maryland Code §§ 4-618, 4-703, 4-704, 4-805, 4-1003; Massachusetts General Laws 130, §§ 38, 55, Michigan Statutes, Conservation § 308.24; Minnesota Statutes, Game and Fish Laws § 98.46; New Hampshire Rev. Statutes §§ 211:23, 211:62-d; Rhode Island Revised Statutes §§ 20-6-1, 20-6-2; Vermont Statutes, Title 10 § 4608; Washington Revised Code § 75.28.020; Wisconsin Statutes §§ 29.34, 29.343, 29.35.

Jurisdiction

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered by a three-judge district court convened under 28 U.S.C. § 2284, on November 7, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statutes Involved

The statutory provisions involved are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1.

Questions Presented

1. Does 16 U.S.C. § 1081, which limits foreign fishing in United States territorial waters, preempt State authority to regulate coastal fishing even though it does not so state and to the contrary recognizes the State's interest in such fishing?

2. Do State licensing statutes which limit fishing in terms of residency and citizenship violate the Equal Protection Clause, although such statutes are of ancient duration and protect a valid and significant State interest?

Statement

The appellees, plaintiffs below, non-resident corporations, challenged the constitutionality of two provisions of the Code of Virginia of 1950, as amended, §§ 28.1-60 and 28.1-81.1, which regulate fishing in that State's coastal waters and bays. Suit was brought against appellant Commissioner of Marine Resources for Virginia to enjoin his enforcement of the statutes.

The appellee, Seacoast Products, Inc., is a Delaware corporation with principal offices in New Jersey. The appellee, Smith Meal Corporation, is a Massachusetts corporation with its main office in New Jersey. Second Oceanic Corporation is a New York corporation and has its principal offices in New York. Smith Meal and Second Oceanic are wholly-owned subsidiaries of Seacoast, which in turn is ultimately controlled by Hanson Trust, Ltd., a corporation organized and existing under the laws of the United Kingdom. The appellee parent and subsidiary corporations have in the past engaged in taking menhaden from the coastal waters of Virginia, but in May of 1975 their applications for commercial fishing licenses were denied for failure to satisfy the United States citizenship requirements of the Virginia statutes.

Virginia Code § 28.1-60 in effect permits licensing of a non-resident to fish for menhaden within the 3-mile coastal waters of Virginia, but denies except as to residents the right to fish in Chesapeake Bay. Virginia Code § 28.1-81.1 in effect excludes all aliens from commercial fishing within the three-mile limit.

The court below found both statutes at issue to be unconstitutional and granted appellees' motion for summary judgment by order entered November 7, 1975.

The Questions Presented by this Appeal are Substantial.

The critical issue raised by this appeal is whether or not the states can regulate and protect the fish resources within their waters.

The need to manage fishing within their coastal waters has been recognized and acted upon by New York, Virginia, and other coastal states. In recent years there has been a particular concern for protecting and preserving the remaining fish resources from depletion because of vastly increased foreign fishing, largely by factory ships which process huge amounts of fish on board and which characteristically overfish to the point of irreversible destruction of fish stocks, and an increasing awareness of the exhaustible nature of our fisheries. The action of the Court below, if permitted to stand, will destroy the progressive actions pursued by the various states in protecting their valuable fish resources from extinction.

I. 16 U.S.C. § 1081 was not intended to preempt regulation of commercial fishing within their coastal waters.

The Court below held that 16 U.S.C. § 1081 "preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them" (Opinion, p. 5). Such a broad, devastating holding has no support in the statute itself or in the principle of preemption as developed by this Court.

The crux of 16 U.S.C. § 1081 is to prohibit foreign vessels or persons in charge of them from fishing within the territorial waters of the United States except upon certain governmental approval including "concurrence of any State, Commonwealth, territory or possession directly affected." Clearly this recognition of State interest in fishing is the very antithesis of preemption.

The Federal statute is entirely without specifics with respect to the conduct of fishing. It does not even approach the level of comparative State and Federal legislation which was present in *A.E. Nettleton Co.* v. *Diamond,* 27 N Y 2d 182, 264 N.E. 2d 118 (1970), app. dism. for want of subn. fed. question *sub nom. Reptile Products Assn.* v. *Diamond,* 401 U.S. 969 (1971),* in which an attack, claiming preemption of the New York law setting forth an expanded

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* See also *Palladio, Inc.* v. *Diamond,* 440 F. 2d 1319 (2nd Cir. 1971), cert. den. 404 U.S. 983.

list of endangered species by the federal endangered species statute, was soundly rejected.

This Court has recognized the "unique resources" of fish and that their management is "a matter of great state concern." *Reetz* v. *Bozanich,* 397 U.S. 82, 87 (1970). This Court also has recognized the right of a state to exercise its police power to protect and regulate fishing within the three-mile limit, *Toomer* v. *Witsell,* 334 U.S. 385, 393 (1948).

It has been repeatedly held by this Court that a limited assertion of authority by Congress does not preclude non-conflicting action by the states. *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960); *Askew* v. *American Waterways Operators,* 411 U.S. 325 (1973); *Skiriotes* v. *Florida,* 313 U.S. 69 (1941). The need to protect fisheries from depletion is just as compelling as the need to protect air quality and water quality properly sustained in those decisions.

The finding of preemption by the court below required a demonstration that it was "the clear and manifest purpose of Congress" to oust the states of any power to regulate commercial fisheries, including laws not in conflict with federal laws. *DeCanas* v. *BICA,* —— U.S. —— (decided February 25, 1976); quoting *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 146 (1963); quoting *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Clearly no intent of Congress to so utterly exclude the States was here manifested.

II. State laws imposing residency and citizenship requirements on commercial fishing do not violate the equal protection clause.

The State of New York, as well as Virginia and other states, has enacted laws which seek to protect and preserve its fisheries and which classify in terms of residency

and citizenship. This Court has held that residents and non-residents may be treated differently so long as there are valid reasons for doing so. *Toomer* v. *Witsell,* 334 U.S. 385, 396 (1948). In *American Commuters Ass'n* v. *Levitt,* 279 F. Supp. 40 (S.D.N.Y. 1967), aff'd 405 F. 2d 1148 (2nd Cir. 1969), a New York statute requiring higher fees for non-resident than resident fishing licenses was upheld as against similar claims that it denied equal protection.

This is clearly not a situation like that in *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948), relied on by the Court below, where the restriction imposed upon aliens was patently and odiously racial and utterly unconnected with the protection of fish stocks from the assault of mechanized armadas. Furthermore, this Court in *Takahashi* at page 417 recognized that State regulations distinguishing between citizens and non-citizens are valid where they "protect special interests either of the state or of its citizens as such." Most recently this Court has affirmed this principle in upholding a California law which prohibits an employer from knowingly employing an alien not entitled to lawful residence in the United States, if such employment would have an adverse effect on lawful resident workers. *DeCanas* v. *BICA,* —— U. S. —— (decided February 25, 1976).

The court below incorrectly held that any distinction between citizens and non-citizens was *per se* unconstitutional. State Legislatures are presumed to have acted constitutionally and for valid reasons. *McDonald* v. *Board of Elections,* 394 U.S. 802, 809 (1969); *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963). The State of Virginia at least should have been and should be given an opportunity to demonstrate that there are valid independent reasons for the differentiation between residents, non-residents and aliens in the area of fishery protection. *Toomer* v. *Witsell, supra,* 334 U.S. at 396.

We are convinced that valid reasons exist for different treatment of non-resident and alien commercial fishermen from residents, as evidenced by the enactment of similar laws in New York and other coastal states, and that such laws should not be lightly swept aside, leaving our coastal fisheries vulnerable to decimation to the detriment of numerous fishermen, shellfishermen, processors and consumers.

CONCLUSION

For the reasons herein stated this Court should note probable jurisdiction in this case.

Dated: New York, New York, March 25, 1976.

Respectfully submitted,

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Appendix A

§ 13-0311. Digger's permit to take shellfish for commercial purposes; when not required

1. Subject to the provisions of this article, a person who has been a resident of this state for six months immediately prior to the date of application may take shellfish from under water lands in the state for commercial purposes upon first obtaining a digger's permit from the department, provided, however, that the application for such permit by a person sixteen years of age or under shall be signed by his parent or legal guardian, who shall thereby consent to the issuance of the permit.

2. The department shall prescribe and furnish forms for application for such permit.

3. The fee for such permit shall be seven dollars and fifty cents. Such permit shall expire on December 31 of the year of issue. If it appears in the public interest, the department may, after hearing held on ten day's notice, suspend or cancel such permits, except that in case of a taking from an uncertified area such suspension or cancellation may be without prior notice.

4. The holder of such permit shall not ship or sell shellfish except to a holder of a valid Class A, D, or G shipper's permit who has a place of business in the township or borough in which such shellfish were harvested, without first obtaining a shipper's permit as provided in subdivision 1 of section 13-0315.

5. Subject to the provisions of this article, a person may, without permit, take from public certified areas not to exceed two pecks of shellfish in any one day for his own or his family use.

Appendix A.

6. The holder of such digger's permit shall carry the permit assigned to him on his person while engaged in the permitted activities, and the failure by such holder to exhibit his permit to any shellfish inspector, conservation enforcement officer, health official, peace officer or magistrate shall be presumptive evidence that no valid digger's permit has been issued to him.

§ 13-0313. Shellfish growers; definitions; bed permit

1. Any person resident in this state one year or more may engage in the cultivation and marketing of shellfish subject to the provisions of sections 13-0307, 13-0309, 13-0311 and 13-0319 and shall be known as a grower.

2. A grower shall not take shellfish, for shipping or marketing from lands owned, leased or rented by him, except upon permit of the department which shall certify that such lands lie within certified areas. The department shall prescribe and furnish forms for application for such permits.

3. The fee for such permit shall be twenty-five cents for each acre from which shellfish are to be taken; provided, however, that the minimum fee shall be five dollars. Such certificates shall expire on December 31 of the year of issue.

4. If it appears in the public interest, the department may suspend or cancel any such permit.

5. Where lands for which such permit has been issued are found to be in part within an uncertified area, the department shall issue without fee, a new permit covering the remaining portion of such lands.

6. In case of assignment or transfer of rights or ownership of any private or leased lands under water, or parts thereof, a new permit shall be required.

Appendix A.

§ 13-0315. Shellfish shipper's and processor's permit

1. Prior to the processing, transportation or shipment of shellfish, either in intra-state or inter-state commerce, an appropriate permit so to do shall be obtained from the department. Such permit shall be required of all shippers and dealers in fresh and frozen shellfish within the state, except retail dealers, and shall certify that the holder thereof has complied with all the requirements of sections 13-0309, 13-0311, 13-0313, 13-0317 and 13-0319.

2. A shellfish shipper's and processor's permit shall be granted to those applicants who comply with the rules and regulations of the department, except that no Class F permit as specified in paragraph f of subdivision 3 of this section shall be issued to a person less than eighteen years of age. The department shall prescribe and furnish forms for application for such permit.

3. Applicants shall pay, and the department shall be entitled to receive, fees according to the type of permit issued, as follows:

a. Class A permit, one hundred dollars. This permit shall allow the holder thereof and any person in his employ to cull, open, shuck, pack and repack shellfish, and to distribute and ship shellfish, either in the form of shell stock or as fresh or frozen open stock, in inter-state and intra-state commerce.

b. Class B permit, fifty dollars. This permit shall allow the holder thereof and any person in his employ to redistribute and reship shellfish which have been purchased from holders of Class A, D, E, F or G shipper's permits, either in the form of shell stock or as fresh or frozen open stock, in inter-state and intra-state commerce. Such redistributions and reshipments of fresh or frozen open

stock shall be made only in the original containers in which received, and shall not be tampered with in any way.

c. Class C permit, twenty-five dollars. This permit shall allow the holder thereof and any person in his employ to redistribute and reship shellfish, which have been purchased from holders of Class A, D, E, F or G permits, in the form of shell stock or as fresh or frozen open stock in intra-state commerce only. Such redistributions and reshipments of fresh or frozen open stock shall be made only in the original containers in which received, and shall not be tampered with in any way.

d. Class D permit, fifty dollars. This permit shall be issued only to growers and shell stock shippers, except reshippers, and shall allow the holder thereof and any person in his employ to call and pack shellfish in the form of shell stock only which have been harvested by the growers or purchased from shellfish shippers, or purchased from holders of diggers' permits who are residents in the town in which the permittee's place of business is located, and to distribute and ship the same in inter-state and intra-state commerce.

e. Class E permit, ten dollars. This permit shall allow the holder thereof to ship in inter-state and intra-state commerce shellfish in the form of shell stock only, which he has legally removed from natural or public shellfish grounds.

f. Class F permit, two dollars and fifty cents. This permit shall allow the holder thereof to distribute and ship in intra-state commerce shellfish in the form of shell stock only, which he has legally removed from natural or public shellfish grounds.

g. Class G permit, ten dollars. This permit shall allow the holder thereof and members of his immediate family,

or not more than two persons in his employ to open, shuck and pack bay scallops only and to distribute and ship bay scallops in the form of fresh open stock only, in intra-state commerce.

h. Shipper's permits shall expire on December 31 of the year of issue. The department may suspend or revoke any such permit at any time on failure of the holder thereof to comply with the conditions thereof.

§ 13-0329. Lobsters; permit to take; when not required; prohibited acts

1. A person may take lobsters (Homarus americanus) for commercial purposes upon first obtaining a permit from the department.

a. A person who has been an actual resident of the state for six months immediately prior to the date of application may take lobsters from the waters of the state upon first obtaining a permit from the department. For purposes of this paragraph the term "actual resident'' shall mean a person who resides within the state at a bona-fide residence.

b. The department shall prescribe and furnish forms for application for such permit.

c. The fee for such permit shall be five dollars.

d. Subject to the provisions of this article, a person who is a resident of the state may take without permit not to exceed six lobsters for his own or family use in any one day.

2. Until January 1, 1979, a non-resident of the state who is a resident of a state that provides reciprocal permits or licenses to New York state residents or a person resident for less than six months immediately prior to the date of application may, upon first obtaining a permit from the

department, take lobsters only from the waters of the state westerly and southerly of a straight line drawn from the Flushing Green Light Number 9 Whistle Buoy at Cerebus Shoals (located approximately seven miles northwesterly to Montauk Point) northwesterly to Race Rock and thence due north to the New York-Connecticut interstate boundary line.

3. Lobster permits shall be nontransferable and shall expire on December 31 of the year of issue. If it appears in the public interest, the department may suspend or cancel any such permit on ten days' written notice to the holder thereof.

4. Buoys or markers of prescribed design shall be used in designating the location of licensed lobster pots or traps in such manner as shall be required by the department.

5. a. Except as provided in subdivision 4 of section 11-0515 only lobsters measuring three and three-sixteenths inches or more from the rear end of the eye socket along a line parallel to the center line of the body shell (carapace) to the rear end of the body shell (carapace) may be taken, possessed, bought, sold, imported and exported.

b. A lobster that has been damaged or mutilated to the extent that its length from the rear end of the eye socket along a line parallel to the center line of the body shall (carapace) to the rear end of the body shell (carapace) cannot be determined shall not be possessed, sold or trafficked in, except that a detached lobster tail composed of the six abdominal segments and fan in the shell (fan composed of uropods and telson) may be possessed, sold or trafficked in provided that the sixth abdominal segment, being that segment nearest the fan, is one and one-sixteenth inches long or more when measured along the dorsal center line with the tail flexed.

c. Lobsters in spawn shall not be taken or possessed at any time.

d. Detached lobster claws may be possessed only in conjunction with legally possessed detached lobster tails. The number of detached lobster claws in possession shall not exceed twice the number of legally possessed detached lobster tails.

e. Landing of lobster or parts thereof not in the shell is prohibited.

6. No person shall unduly disturb or without the consent of the licensee take or remove lobsters from a lobster pot or trap or other commercial gear.

7. It is unlawful for the operator of a motor vehicle, boat, vessel or conveyance of any kind, or any person, who has been requested or signaled to stop by an enforcement officer to throw or dump into the water any lobster, or the contents of any jail, bag, barrel or any matter whatsoever, before the enforcement officer has inspected the same.

§ 13-0331. Crabs; permit to take; prohibited acts

1. No person shall take blue-claw crabs (Callinectes sapidus) for commercial purposes without first obtaining a permit from the department.

2. A person who has been a resident of the state for six months immediately prior to the date of application may take crabs for commercial purposes from the waters of the state upon first obtaining a permit from the department.

a. The department shall prescribe and furnish forms for application for such permit.

b. The fee for such resident crabbing permit shall be fifteen dollars.

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3. A non-resident of the state or a person resident for less than six months immediately prior to the date of application may take crabs, for commercial purposes, only from the waters of Lower Bay and Raritan Bay southerly of a straight line drawn from Point Fort Wadsworth, Staten Island to Norton Point, Coney Island, upon first obtaining a non-resident crabbing permit from the department.

a. The department shall prescribe and furnish forms for application for such permit.

b. The fee for such non-resident crabbing permit shall be twenty-five dollars.

4. Permits are not transferable and shall expire on December 31 following the date of issue. If it appears in the public interest, the department may suspend or cancel such permits without prior notice.

5. Female crabs with eggs visible thereon, commonly called sponge crabs or any female crabs from which the egg pouch or bunion has been removed shall not be taken, possessed, transported or offered for sale at any time.

6. Crabs shall not be taken by dredging in the waters of Hempstead bay and South Oyster bay in the county of Nassau or in the waters of Great South bay west of Captree bridge in the county of Suffolk.

§ 13-0333. Menhaden; license; prohibited acts

1. Menhaden or other fish, from which oil or fertilizer is made, subject to the provisions of section 13-0343, may be taken from the waters of the marine district provided a license is first obtained from the department.

Appendix A.

2. Each license shall be issued to cover one boat into which such fish are taken and shall be issued in the name of the owner, lessee or operator of each boat so used. License fees shall be computed on the basis of gross tonnage of the vessel to be licensed as indicated in the document, certificate of award, register, enrollment or license of such vessel issued by the United States Collector of Customs.

3. The license fee shall be: For each vessel of sixty gross tons or over, two hundred dollars; for each vessel of less than sixty gross tons, twenty-five dollars. All licenses issued under this section shall expire on December 31 following date of issue.

4. Non-residents of the state shall not fish for menhaden with purse nets in the Atlantic Ocean within three nautical miles of shore from Fire Island lighthouse to Romer Shoal lighthouse.

5. In the area of Long Island Sound extending from Buoy 13 off Eatons Neck in Suffolk County westerly to Buoy 44 off Execution Rocks and off the shoreline of Westchester County extending from Buoy 36 westerly to said Buoy 44, commercial menhaden seines may not be operated closer to shore than the following limits determined primarily from the Long Island Sound ship channel buoy line:

(a) From Buoy 13 (north shore of Long Island) to Buoy 44 (off Execution Rocks)—seining vessels must not operate closer to shore than the lines connecting the designated buoys and navigational aids.

(b) From Buoy 36 (off the shoreline of Westchester county) to Buoy 44 (off Execution Rocks)—seining vessels must operate at least one-half mile seaward from the lines connecting the designated buoys and navigational aids.

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Distances shall be determined from straight lines drawn between the designated buoys and navigational aids.

The following buoys and navigational aids shall be considered to be the line of demarcation: north shore of Long Island—Buoys 13, N4 (Huntington Bay) 15, 17, 19, 21 N4 (Hempstead Harbor) 23, 44 (off Execution Rocks); Westchester County—commencing at the New York state border on a line projected from Great Captain Island light to Buoy 36, Buoys 36, 38, 38A, 40, 40A, 42, black can C1 designating the port side of the Echo Bay channel entrance off New Rochelle, Buoy 44 (off Execution Rocks). As amended L.1974, c. 455, § 1.

§ 13-0335. Food fish; license; prohibited acts

1. A citizen resident of the state for not less than six months immediately preceding such taking may without license take food fish in the marine district (a) with beam traws and otter trawls, except in the Hudson river and in those waters described in section 13-0341 or section 13-0343 in which use thereof is prohibited, and (b) with nets other than beam trawls and otter trawls, except in the Hudson River and in the waters described in section 13-0343 to the extent that use of such nets is prohibited by that section in those waters.

2. Boats of non-residents may be licensed to take food fish in the marine waters of New York with beam and otter trawls, (a) operated solely from boats and (b) except with beam and other trawls in those waters described in section 13-0341 or section 13-0343, provided the boat is registered in a state which accords reciprocal fishing privileges, and provided the owner and captain are citizens of the United States and residents of a state according reciprocal privileges to residents of this state. The license shall be issued in the name of the boat.

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3. The license fee and the terms of the license specified in subdivision 2 of this section shall be as follows:

a. The fee shall be computed on the basis of four dollars per lineal foot or fractional part thereof of the registered length of the boat or vessel to be licensed as indicated on its document, certificate of award, register, enrollment or license, issued by the United States Collector of Customs;

b. Such license shall not be transferable;

c. Each license shall expire on the thirty-first day of December next succeeding its issue;

d. If it appears in the public interest the department may suspend or cancel any such license on ten day's notice in writing to the holder thereof.

4. It shall be unlawful for any person to render food fish into fertilizer.

5. No person shall take or remove from any legally set or operated nets or other commercial gear in the waters of the marine district any fish or crustacea without permission of the owner thereof, nor possess any fish or crustacea that has been so taken or removed.

§ 13-0341. Beam trawls and otter trawls; use prohibited in certain waters

Beam trawls and otter trawls shall not be set or used in the water areas of the marine district described in the following subdivisions:

1. In the waters of the county of Richmond and in the counties of Kings or Queens, northerly and westerly of a line from the sea end of the breakwater at Rockaway Point to Romer Shoal lighthouse, including Jamaica Bay and its adjacent bays, inlets, creeks and basins.

2. In the Atlantic Ocean within one-half mile of the coastline and in all connecting tidal waters inshore of the coastline, from Rockaway Inlet Jetty to the Town of Babylon bathing pavilion at Cedar Island Beach, and in all tidal waters inshore of a line from the Town of Babylon bathing pavilion to the sea buoy (BW S-I, Bell) at the entrance of Fire Island Inlet and thence to the seaward end of Fire Island Inlet Jetty.

3. Moriches Inlet, in Shinnecock Inlet and in Mecox Inlet within one-half mile of the narrowest part of the mouths of such inlets.

4. In Manhasset Bay southerly of a line from Barker's Point to Hewlett's (King's) Point; in Hempstead Harbor southerly of a line from Mott's Point easterly through the breakwater at Glen Cove, and in the Nissequogue River.

5. In the Harlem River and the East River east of the Triborough Bridge and in Long Island Sound west of a line drawn from Hewlett's (King's) Point to the north end of Hart Island, thence to the south end of Glen Island, and in their adjacent bays, coves, creeks and confluent waters.

6. In Flanders Bay, Great Peconic Bay, Little Peconic Bay, Noyac Bay and Shelter Island Sound, including all waters forming a part thereof or tributary thereto, lying westerly and southerly of an imaginary line extending from Conklins Point to Jennings Point and westerly and northerly of a imagianry line extending from South Ferry on Shelter Island to North Haven from April 15 to October 1.

7. In the county of Suffolk in the waters lying westerly of an imaginary line extending in a southerly direction from the most easterly end of Plum Island to the most

northerly end of Gardiners Island, and westerly of Gardiners Island, and westerly of a line extending in a southerly direction from the most southerly end of Gardiners Island to Goff Point; provided, however, that vessels and motorboats owned and operated by citizens who are residents of the state may be used in such waters in connection with the operation of beam trawls and otter trawls and other types of nets towed by such boats and vessels. Nothing in this subdivision shall be construed as legalizing the operation of any beam trawls or otter trawls in the waters described in subdivision 6 of this section from April 15 to October 1.

8. In Long Island Sound west of an imaginary line from the New York-Connecticut boundary shore line extending easterly and southerly to Eaton's Point Neck on Long Island from April 1 to November 1.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
APPELLANT,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC.,
and SECOND OCEANIC CORPORATION,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMICUS CURIAE, THE COMMONWEALTH OF MASSACHUSETTS, IN SUPPORT OF NOTING PROBABLE JURISDICTION

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BRIEF OF THE AMICUS CURIAE, THE COMMONWEALTH OF MASSACHUSETTS, IN SUPPORT OF NOTING PROBABLE JURISDICTION

Interest of the Commonwealth of Massachusetts

The Commonwealth of Massachusetts currently has in force several statutes which, like the Virginia statutes here

at issue, impose restrictions upon nonresidents and resident aliens relative to fishing in the State's territorial waters.[1] A decision in this case would have a substantial *stare decisis* effect on possible future cases challenging such statutes.[2]

Accordingly, in addition to the arguments advanced by the defendant-appellant and various *amici curiae* in support of noting probable jurisdiction, Massachusetts sets forth the following points.

Argument

I. THE ENACTMENT OF 16 U.S.C. § 1081 (1974) HAS NOT PREEMPTED THE POWER OF VIRGINIA TO IMPOSE THE RESIDENCY AND CITIZENSHIP REQUIREMENTS CONTAINED IN VA. CODE §§28.1-60 AND 28.1-81.1 (1950).

An exercise of federal power preempts an exercise of state power only when the former is necessarily inconsistent with the latter. *See, e.g., Skiriotes* v. *Florida*, 313 U.S. 69, 75 (1941). No such inconsistency exists between the provisions of 16 U.S.C. § 1081 (1974) and the residency and citizenship requirements contained in VA. CODE §§28.1-60 and 28.1-81.1 (1950).

The provisions of 16 U.S.C. § 1081 (1974) address only the rights of foreign vessels. They are completely silent relative to the rights of domestic vessels. With respect to

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[1] Specifically, such statutes are MASS. GEN. LAWS ANN. ch. 130, §§38 and 55 (1974); Ch. 35, MASS. ACTS [1923] 17 *as amended by* Ch. 219, [1962] MASS. ACTS 107; and Ch. 158, [1936] MASS. ACTS 153.

[2] It should be noted that on March 12, 1976, the Supreme Judicial Court of Massachusetts rendered a decision to the effect that the restrictions imposed on nonresidents by Ch. 35 MASS. ACTS [1923] 17 *as amended by* Ch. 219, [1962] MASS. ACTS 107, are violative of the Privileges and Immunities Clause of U.S. CONST. art. IV, §2(1). *Commonwealth* v. *Westcott*, MASS. ADV. SH. (1976) 696. The Attorney General of Massachusetts is currently preparing for this Court a Petition for a Writ of Certiorari relative to such decision.

foreign vessels, the statute generally excludes said vessels from fishing in United States waters. To the extent that said vessels are permitted to fish in United States waters, the permission is contingent upon the "concurrence" of the States "directly affected." Under such circumstances, 16 U.S.C. § 1081 (1974) can hardly be said to conflict with, and thereby preempt, the operation of Virginia's residency and citizenship requirements.

There is a second reason why 16 U.S.C. §1081 (1974) should not be construed as preempting Virginia's residency and citizenship requirements. The right to determine who may or may not take fish is a right derived from ownership. *See McCready* v. *Virginia*, 94 U.S. 391, 395-396 (1877). *See also, Geer* v. *Connecticut*, 161 U.S. 519, 523-534 (1896). In that regard, Congress has, through the passage of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970), expressly established that the ownership of fish found within three miles of each State's coastline lies exclusively in that State. It has thereby also established that each State possesses the exclusive power, subject to relevant constitutional requirements, to determine who may and who may not take such fish.[3] Thus, to construe 16 U.S.C. § 1081 (1974) as superseding an exercise of that power would effect an implied repeal of the Submerged Lands Act. Because of this Court's traditional hostility to the doctrine of implied repeal, that construction should be rejected. *See Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974).

Accordingly, it is plain that 16 U.S.C. § 1081 (1974) has not preempted Virginia's attempt, through VA. CODE §§28.1-60 and 28.1-81.1 (1950), to restrict the right of nonresidents and resident noncitizens to fish in its waters.

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[3] Although Congress expressly retained the power to regulate commerce, navigation, national defense and international affairs within State territorial waters, said power does not, by itself, include the right to determine who may and who may not take fish. *See The Abby Dodge*, 223 U.S. 166, 174 (1912); *McCready, supra.*

II. Neither the Residency Requirement of Va. Code §28.1-60 (1950) Nor the Citizenship Requirement of Va. Code §28.1-81.1 (1950) Violates the Equal Protection Clause.

Distinctions drawn by a State in the course of economic regulation comport with the requirements of the Equal Protection Clause so long as they are rationally related to a legitimate State purpose. *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949). Both the distinction drawn by Va. Code §28.1-60 (1950), between residents and non-residents, and that drawn by Va. Code §28.1-81.1 (1950), between citizens and non-citizens, meet the standard of constitutionality.

By virtue of the Submerged Lands Act of 1953, 43 U.S.C. §1301 *et seq.* (1970), the citizens of each State, in their collective sovereignty, possess exclusive ownership rights in all of the fish found within the territorial waters of that state.[4] Non-residents and aliens, not being citizens of the State, possess no such ownership rights. Thus, in withholding the right to take fish from those who are non-residents or resident non-citizens, Va. Code §§28.1-60 and 28.1-81.1 (1950) further the purpose of preserving an important natural resource for the exclusive use of those who own the resource. The furtherance of such a purpose on the part of the State is clearly within its police power.[5]

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[4] Prior to passage of the Act, this Court had held that the States possessed no common law rights of ownership in fish found in the marginal sea. *Toomer* v. *Witsell*, 334 U.S. 385, 395-402 (1948).

[5] While language in *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948) may suggest that a distinction drawn between citizens and resident non-citizens relative to the right to take fish is violative of the Equal Protection Clause, the distinction actually presented in that case was one between non-citizens of a particular nationality and all other non-citizens. Thus, the Court's discussion of the broader distinction was unnecessary. For that reason, and in light of the precedent in favor of a contrary view, *Takahashi* should not be deemed controlling in this case.

Geer, supra at 534-535. *See also Commonwealth* v. *Westcott*, Mass. Adv. Sh. (1976) 696, 715 (Reardon, J., dissenting).

Accordingly, neither the residency requirement of Va. Code §28.1-60 (1950) nor the citizenship requirement of Va. Code §28.1-81.1 (1950) is violative of the Equal Protection Clause.

Conclusion

The Commonwealth of Massachusetts urges that the Court note probable jurisdiction and set the case down for oral argument.*

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* The assistance of Eugene K. Chow of the Boston College Law School is gratefully acknowledged.

APPENDIX

In addition to the constitutional and statutory provisions set forth in the briefs of the defendant-appellant and of other *amici curiae,* relevant provisions of the Submerged Lands Act of 1953, as embodied in 42 U.S.C. § 1031 *et seq.* (1970), are herein set forth.

43 U.S.C. § 1301 (1970)

Definitions

When used in this chapter —

(a) The term "lands beneath navigable waters" means —

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the

time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to Section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United

States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

43 U.S.C. § 1311 (1970)

Rights of the States — Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Release and relinquishment of title and claims of the United States; payment to States of moneys paid under leases

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid hereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

Leases in effect on June 5, 1950

(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being pro-

duced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

Authority and rights of the United States respecting navigation, flood control and production of power

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and

waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

Ground and surface waters west of the 98th meridian

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

43 U.S.C. § 1312 (1970)

Seaward boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as

questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

43 U.S.C. § 1314 (1970)

Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in the powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, propriety rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1255.

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., et al.,

Appellees.

Brief of Amicus Curiae in Support of Statement as to Jurisdiction to Review Judgment of the United States District Court for the Eastern District of Virginia.

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Appellees.

—

BRIEF AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION.

—

INTERESTS OF AMICUS CURIAE.

The *amicus curiae* is the State of Delaware, located on the eastern seaboard of the United States, with 130 miles of coastline on the Delaware River, Delaware Bay, and the Atlantic Ocean. It has a substantial interest in the regulation of the fisheries within its jurisdiction.

The court below held invalid two of the basic provisions of the Virginia Code governing the fishing industries operating in that State. One of those statutes, § 28.1-81.1 of the Code of Virginia of 1950, as amended was held to be violative of the Supremacy Clause of the Constitution, Art. VI, ¶ 2, because of pre-emption of this state law by the Act of 20 May 1974, 78 Stat. 194, 16 U. S. C. § 1081.

The court's resolution of this issue represents a significant departure in the law concerning the roles of the States and the federal government in the regulation of state and coastal fisheries. This ruling is the basis of the interest of the *amicus curiae*.

THE QUESTIONS ARE SUBSTANTIAL.

16 U. S. C. § 1081, Prohibiting Foreign Vessels From Fishing in United States Territorial Waters Except Upon Concurrent Federal and State Authorizations Does Not Reserve to the Federal Government Exclusive and Preemptive Authority to Regulate Commercial Sea Fisheries Within the Three-Mile Territorial Limit.

The District Court below found that 16 U. S. C. § 1081, ". . . preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them." Nowhere does the Court attempt to limit the breadth of this holding to the particular aspect of commercial fishing addressed by this federal law. The effect of this holding is to nullify a wide range of Delaware statutes that regulate commercial fishing in various ways. These include, among other things, prohibitions of trawling, seasonal restrictions, regulations on fish size, types and placement of nets, landing restrictions, licensing requirements and lease agreements on subaqueous lands. It is clear that this holding goes far beyond the language and intent of 16 U. S. C. § 1081.

This broad interpretation of 16 U. S. C. § 1081 conflicts with basic principles of federal pre-emption and the application of these principles to the area of commercial sea fisheries. This Court has consistently held that the States may supplement federal regulations in a limited field where the state has a valid interest to protect and where there is no conflict between the state and federal laws. *Kelly v. Washington*, 302 U. S. 1 (1937), *Mintz v. Baldwin*, 289 U. S. 346 (1933), *Savage v. Jones*, 225 U. S. 501 (1912) and *Reid v. Colorado*, 187 U. S. 137 (1902).

These principles have been applied to State regulation of commercial sea fisheries with the three-mile limit, and this Court has held that the States may regulate in this area in the absence of any conflict with federal law. *Toomer v. Witsell,* 334 U. S. 385 (1948); *U. S. v. California,* 332 U. S. 19 (1947); *Skiriotes v. Florida,* 313 U. S. 69 (1941).

It is important for this Court to take jurisdiction of this case, since the decision below threatens state regulation of matters legitimately within its police power, threatens existing and contemplated state laws regarding commercial fishing and threatens the well-settled balance of state-federal control in this area.

16 U. S. C. § 1081, Prohibiting Foreign Vessels From Fishing in United States Territorial Waters Except Upon Concurrent Federal and State Authorization Does Not Evidence Any Intent to Preempt State Regulations of Commercial Fishing Even as Limited to the Control of Foreign Vessels Within the Three-Mile Territorial Limit, and in Fact Evidences an Intent to the Contrary.

In resolving the pre-emption issue, the District Court also held that ". . . prevention of incursions by foreigners is the responsibility exclusively of the Federal government." Even if the Court's decision can be restricted in this way to the limited applicability of 16 U. S. C. § 1081, it is still at odds with the language and intent of the statute and general rules of federal pre-emption.

16 U. S. C. § 1081 bans foreign vessels from fishing in United States territorial waters in the absence of specified authorization. Authorization can only be given, in the words of the statute, "upon concurrence of any State, Commonwealth, territory, or possession directly affected."

Thus, the language of the federal law indicates that it is not intended to pre-empt state control.

This interpretation is strongly supported by the legislative history of 16 U. S. C. § 1081. The Report of the House Committee on the Merchant Marine and Fisheries, H. R. Rep. No. 1356, 88th Cong., 2d Sess. (1963), discusses "the built-in veto power extended to the States directly affected by this bill," and indicates "that the powers of the States in dealing with trespassers of their territorial waters would not be preempted . . ." 2 U. S. Code Cong. & Adm. News 1964, p. 2183.

This Court has repeatedly held that federal enactments are preemptive only where there is express statutory intent to preempt the field in question or where the federal and state laws cannot operate consistently. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 142 (1963); *Savage v. Jones,* 225 U. S. 501, 535 (1912). Since the federal statute is intended to give the States a veto-power, Virginia Code § 28.1-81.1 cannot be deemed inconsistent with the federal law, and the absence of any express intent to preempt has been discussed.

To the extent that the District Court's decision holding § 28.1-81.1, Code of Virginia (1950), as amended, unconstitutional can be said to be based upon a violation of the Equal Protection Clause of the Fourteenth Amendment, it is worthy to note that the classification made is identical to that of the federal statute, and that non-citizens do in fact constitute the peculiar source of the evil at which both statutes are aimed. See, *Toomer v. Witsell,* 334 U. S. 385 (1948).

It is important for this Court to take jurisdiction of this case in order to correct the District Court's erroneous interpretation of 16 U. S. C. § 1081, and to preserve the existing relationship between the States and the Federal Government in the regulation of commercial sea fisheries.

CONCLUSION.

The Court below has erroneously interpreted 16 U. S. C. § 1081, and its decision threatens to invalidate a large number of laws of the State of Delaware that regulate commercial sea fisheries. In the process of erroneously invalidating § 28.1-81.1 of the Code of Virginia of 1950, as amended, as unconstitutional, the Court's holdings threaten to disrupt the balance of State and Federal authority in the regulation of commercial fishing within the territorial waters. For these reasons, this Court should note probable jurisdiction in this case to review the decision below.

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In The

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JAMES E. DOUGLAS, JR.

Appellant,

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SEACOAST PRODUCTS, INC., et al.,

Appellees.

Brief Amicus Curiae In Support Of Statement As To Jurisdiction

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BRIEF AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

INTERESTS OF AMICUS CURIAE

When the coastline of Maine is straightened, it measures over 3000 miles in length. The actual configuration is extremely convoluted with countless bays, inlets and estuaries which provide nursery areas and feeding grounds for the State's fisheries. Despite natural advantages offered by this coastline, landings of fish in Maine have declined in recent years and the best scientific information indicates that Maine's coastal fisheries are seriously depleted. One major cause of the depletion of renewable marine resources is the immensely efficient and highly selective fishing effort exercised by foreign vessels and crews beyond 12 miles and by nonresident vessels within Maine coastal waters. Despite the serious consequences of nonresident fishing, Maine at present excludes nonresidents from only the lobster fishery. 12 M.R.S.A. § 4404. Without the authority to exclude nonresidents, this fishery could not be managed because the extreme

length of Maine's coastline makes enforcement of management restrictions possible only with the voluntary compliance of the Maine fishermen. To this point, local adherence to sound management principles has been obtained because the increased production derived from State management restrictions has benefitted local fishermen. If nonresidents cannot be excluded from the benefits of the management cooperation of local fishermen, that cooperation will disappear and the fishery will be seriously depleted. Maine's interest in maintaining a healthy lobster fishery is strong.

The exclusion of nonresidents is necessary to accomplish any rational management objective. To fish in Maine, nonresidents must use boats which can fish long distances from port and which exert effort wherever local conditions are profitable. Historically, distant water nonresident boats have been larger and more efficient than the local fleet which is more limited in range and effort. Because the nonresident fleet is highly mobile, it can exert an extremely unpredictable effort upon the local fisheries. In contrast, the local fleets exert an effort which is nearly constant. Since every management regulation restricting the amount or nature of the fishing on any particular species is based upon an assumption about the amount of effort which will be exerted, the unpredictable exercise of substantial effort by nonresident fleets undermines the objectives of all fisheries management by the State.

The State of Maine has been hard pressed by the pulse fishing capabilities and techniques exercised beyond 12 miles by foreign vessels. Only within the past month have the coastal states succeeded in their effort to persuade Congress to pass legislation which provides the authority to exclude foreign vessels from fisheries utilized by American fishermen. Having so recently obtained this new management opportunity from the legislative branch, it would be ironic for the judiciary to deprive the coastal states of an equally important

management mechanism, the authority to exclude nonresidents from their inland water areas.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on November 7, 1975. It is not yet reported.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered by a three-judge district court convened under 28 U.S.C. § 2284, on November 7, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, ¶ 2, and the Equal Protection Clause, Amendment XIV, §2. The statutory provisions are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1.

QUESTIONS PRESENTED

1. Whether a state statute which prohibits nonresidents from fishing stocks concentrated in inland waters violates the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the Bartlett Act, 16 U.S.C. § 1081, et seq., preempts state regulation of a documented United States vessel in waters within its marine boundaries?

STATEMENT

The three-judge court held that 28.1-60 of the Code of Virginia of 1953 violates the Equal Protection Clause of the Fourteenth Amendment.

The lower court also held that the Bartlett Act, 16 U.S.C. § 1081, preempted 28.1-81.1 of the Virginia Code of 1950 denying foreign owned corporations any license to fish within Virginia's marine boundaries and "preempted Virginia's control of commercial sea fisheries and superseded state regulation of them".

The lower court's decision raises substantial legal questions and threatens to erode the established scope of the states' authority to manage the fisheries resources within their marine boundaries.

ARGUMENT

I. Virginia's exclusion of nonresidents from its internal waters does not violate the equal protection clause of the fourteenth amendment.

The lower court erroneously concluded that § 28.1-60 of the Code of Virginia of 1950 violates equal protection guarantees by misapplying *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) to the facts of this case. In that case, the court invalidated a California statute prohibiting persons ineligible for citizenship from fishing in territorial waters. The court found the California statute constituted racial discrimination which could not be justified by a "special public interest" in the territorial sea fisheries id. at 420. The *Takahashi* decision does not address the issues in this case because the distinctions drawn by § 28.1-60 of the Virginia Code are not based on racial prejudice but on rational conservation practice, because the Virginia statute applies only to fishing in internal waters, not the territorial sea, and finally because the Submerged Lands Act has substantially enlarged the scope of the states' "special public interest" in the fisheries from that which existed when this court decided *Takahashi*. Thus when *Takahashi* was decided in 1948, the scope of state interest in waters within the three-mile territorial sea was limited by the Supreme Court's decision that the federal government, not the State of California, held paramount rights and power over the territorial sea *United States v. California*, 332 U.S. 19 (1947). Subsequently the Submerged Lands Act granted each coastal state "title to and ownership" as well as the right to manage the fisheries resources within the territorial sea. 43 U.S.C. 1311 (a) (b) (1). The Submerged Lands Act established the state interest in the fisheries resources and substantially weakened the assumption about state interests upon which both *Takahashi* and *Toomer v. Witsell*, 334 U.S. 385 (1948) were decided. The scope of state management authority over the fisheries resources granted by the Submerged Lands Act is a substantial legal question which has never been decided by this Court. It is clear that the lower court's reliance on cases decided prior to passage of the Submerged Lands Act does not settle the issue.

The only Supreme Court decision which does address the states' authority to exclude nonresidents from inland waters is *McCready v. Virginia*, 94 U.S. 391 (1876). In that case, this Court upheld Virginia's right to exclude nonresidents from the exploitation of oysters in inland waters of the state. The menhaden in Chesapeake Bay and most other inland waters are concentrated by inland configurations during certain stages of their life cycle. For the same reasons that the Court permitted the states' exclusion of nonresidents from exploiting oysters in inland waters, it should allow state exclusion of nonresidents from exploiting menhaden or other species which are concentrated there.

II. The Bartlett Act, 16 U.S.C. 1081, et seq., did not preempt state control of commercial sea fisheries and did not supersede state regulation of them.

Citing *Toomer v. Witsell*, 334 U.S. 385, 393, 394 (1948); *United States v. California*, 332 U.S. 19 (1947); *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941) and *Manchester v. Massachusetts*, 139 U.S. 240

(1891), the lower court concluded that the Bartlett Act preempted Virginia's control of commercial sea fisheries and superseded state regulation of them. The decisions cited by the lower court described the scope of the federal government's right to preempt state fisheries regulation prior to the Submerged Lands Act. These cases found that affirmative federal legislation could preempt conflicting state regulation in the territorial sea if there was direct conflict between state and federal regulation. In *Manchester v. Massachusetts*, the court found preemption could occur only when the federal government regulated a specific fishery id. at 266. In *Skiriotes v. Florida*, no preemption occurred even though the federal legislation did regulate a different aspect of the sponge fisheries which was regulated by the state id., at 75. In *Toomer v. Witsell*, the court failed to find preemption where Congress had not regulated the shrimp fishery managed under the authority of South Carolina. Under these decisions, preemption of the states' authority to manage the menhaden fishery has not occurred because the Bartlett Act is limited to the exclusion of vessels not subject to United States jurisdiction and does not purport to establish management restrictions which could conflict with state regulation of the menhaden or any other fishery.

The lower court's total reliance upon pre-Submerged Lands Act decisions of this Court re-emphasizes its lack of awareness of the paramount management rights which the Submerged Lands Act granted the states in the territorial sea. This authority has been carefully protected by Congress in subsequent legislation. In its Brief In Support of the Jurisdictional Statement, Amici Curiae, Virginia Seafoods Council, et al, mention several Federal Acts regulating marine resources which clearly preserve state authority in the territorial sea at pp. 16-18. Other Acts of Congress also establish the intent to preserve state fisheries management authority in the territorial sea. The Atlantic Tunas

Convention Act, 16 U.S.C. § 971, enabled implementation of the recommendations of the International Tuna Commission for Conservation of Atlantic Tunas by providing the Secretary of Commerce the authority to promulgate regulations to conserve the world's depleted tuna stocks. The Act expressly affirms the jurisdiction of the states in the territorial sea, 16 U.S.C. 971 (g) (d) (1) and contemplates state regulation of both United States and foreign vessels, 16 U.S.C. 971 (g) (d) (2). More recently Congress passed the Fisheries Conservation and Management Act of 1976 4R 200 which extends the exclusive fisheries authority of the United States to 200 miles and expressly preserves the jurisdiction of coastal states within the boundaries established by the Submerged Lands Act, sec. 306 (c.) Clearly Congress did not intend the absolute preemption which the lower court concluded the Bartlett Act has achieved. Unless this Court corrects its obvious error, the lower court decision will nullify all management programs now being conducted by coastal states.

The only arguable preemption issue created by the Bartlett Act is whether the state has concurrent authority to regulate foreign vessels within its Submerged Lands Act boundaries. However, this issue is not before this Court because vessels of Seacoast Products Inc. were documented United States vessels within the meaning of the Bartlett Act. If, however, Maine is wrong and the Seacoast Products vessels are foreign vessels which are excluded by the Bartlett Act, the Court should still not summarily conclude that the state authority is preempted. At the present time the extent of Texas' and Florida's authority to regulate foreign vessels and crews within their three league Submerged Lands Act boundaries has been raised by the United States in *United States v. Florida and Texas*, S.Ct. No. 54 Original. One issue in that case is whether the Bartlett Act or the Contiguous Fisheries Zone Act has preempted concurrent state authority over foreign vessels and crews within the ad-

ditional 3-9 mile area the Submerged Lands Act granted Florida and Texas off their Gulf coasts. In that case this Court appointed a Special Master to preside over full discovery and presentation of the evidence. After nearly four years of discovery, the parties are still preparing for trial. Since the Submerged Lands Act grant of management authority over foreign vessels to Florida and Texas in the area between 3 and 9 miles is, if anything, weaker than the authority granted to all states within the traditional three-mile territorial sea, it is unrealistic to assume that the lower court could correctly decide the issue without hearing any evidence. This Court should provide the coastal states which desire to assert concurrent fisheries management authority over foreign vessels at least the opportunity it has offered Florida and Texas to support their authority in this regard.

CONCLUSION

For the foregoing reasons, the lower court's decision creates substantial legal issues of significant importance to the State of Maine. This court should note probable jurisdiction of the issues raised herein.

Respectfully submitted,

JOSEPH E. BRENNAN
Attorney General

EDWARD F. BRADLEY, JR.
Assistant Attorney General

Supreme Court, U. S.
FILED
JUN 30 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

ANDREW P. MILLER
Attorney General of Virginia

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Filed March 5, 1976
Probable Jurisdiction Noted April 26, 1976

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation,

Plaintiffs,

v.

James E. Douglas, Jr.,

Defendant.

DOCKET ENTRIES

July 14, 1975—Plaintiffs filed Complaint, Motion for Preliminary Injunction, Motion for Ex parte Temporary Restraining Order.

July 15, 1975—Hearing on Motion for Ex parte Temporary Restraining Order; Motion denied; Order entered requesting designation of three-judge court.

July 18, 1975—Order entered designating three-judge court.

August 1, 1975—Defendant filed Answer and Motion to Abstain.

October 1, 1975—Plaintiffs filed Motion for Summary Judgment.

October 15, 1975—Hearing before three-judge court on Motion for Summary Judgment, Complaint, Motion for Preliminary Injunction, Motion to Abstain.

November 7, 1975—Final Order entered granting Plaintiffs' Motions for Summary Judgment and Injunction.

January 5, 1976—Appellant's Notice of Appeal filed with lower court.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

1. Plaintiff The New Smith Meal Company, Inc., (hereinafter sometimes referred to as "Smith Meal") is a corporation organized under the laws of the Commonwealth of Massachusetts and has its principal place of business at Port Monmouth, New Jersey. Plaintiff Second Oceanic Corporation (hereinafter sometimes referred to as "Oceanic") is a corporation organized under the laws of the State of New York and has its principal place of business at Amagansett, New York. Plaintiff Seacoast Products, Inc. (hereinafter sometimes referred to as "Seacoast") is a corporation organized under the laws of the State of Delaware and has its principal place of business at Port Monmouth, New Jersey. These three corporations are, within the meaning of United States Code, Title 28, Section 1332 citizens of the States of Massachusetts, New Jersey, New York and Delaware. Defendant James E. Douglas, Jr. is Commissioner of the Virginia Marine Resources Commission and is also a citizen of the State of Virginia and the United States.

2. The controversy is, therefore between citizens of different states of the United States and also arises, as hereinafter more particularly shown under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00) as to each individual Plaintiff, exclusive of interest and costs. Jurisdiction is therefore conferred upon this Court by the provisions of the United States Code, Title 28, Sectons 1331 and 1332.

3. This action is brought to restrain the enforcement by Defendant, who is by law charged with such enforcement, of certain statutes of the State of Virginia, namely Virginia Code Section 28.1-81.1 and portions of Section 28.1-60(3) upon the grounds that said statutes are unconstitutional; this action is required by the provisions of the United States Code, Title 28, Sections 2281 to 2284, inclusive, to be heard before a Court of three judges to be convened in accordance with the provisions of said statutes.

4. Plaintiffs Oceanic and Smith Meal are wholly-owned subsidiaries of Seacoast which in turn through intermediary corporations is controlled by Hanson Trust Limited, a corporation organized and existing under the laws of the United Kingdom.

5. Seacoast Products, Inc., through its own operations and those of its subsidiaries, including Oceanic and Smith Meal, is engaged in the business of fishing for menhaden and in processing the catch for commercial purposes. The entire catch of the vessels owned by Smith Meal is furnished to Seacoast for processing. This processing results in three products, mainly fish meal, used principally for poultry feed, fish solubles, an ingredient of animal feed, and fish oil, exported primarily to Europe and Canada for use in the manufacture of margarine.

Fish oil is also used domestically for certain industrial purposes. The business of Plaintiffs constitutes a major seg-

ment of the American menhaden industry, an industry which is important to the health, welfare and economic well-being of many citizens and residents of the United States. Such business is dependent upon the catching of menhaden within the territorial waters of coastline states, including Virginia.

6. Menhaden is a species of migratory fin fish which during their summer migration remain close to the shore line. Fishing for menhaden is commercially feasible only during their summer migration when they are close to the shore where they travel in large, closely packed schools. Practically all menhaden are caught within three miles of the shore.

7. From approximately June through October of each year, large quantities of menhaden are found within the territorial waters of the states bordering on the Atlantic Ocean. During those months, commercial fishing for menhaden is effected within the territorial waters of a particular state where menhaden at that time appear, whether such state be Virginia or some other state bordering on the Atlantic Ocean.

8. Plaintiff Seacoast and its subsidiaries and predecessors have, over the years caught substantial amounts of menhaden within the territorial waters of the State of Virginia and in so doing have lawfully applied for and received non-resident licenses for such activities from the Virginia Marine Resources Commission. With each of these applications for a license has gone an executed power of attorney appointing the Secretary of the Commonwealth of Virginia as agent for the applicant for service of process within that jurisdiction as required by Virginia Code Section 28.1-60(5).

9. Plaintiff Seacoast and its subsidiaries operate a fleet of roughly 30 fishing vessels employing over 450 persons as

crews thereon, all of whom are American citizens. In addition, Plaintiff Seacoast owns and operates processing plants at Port Monmonth, New Jersey, as well as Morgan City, Abbeville and Cameron, Louisiana, with terminals for fish meal at Lewes, Delaware and Sabine, Texas plus shipyards for repair of vessels at Salisbury, Maryland and Abbeville, Louisiana. Plant and other personnel approximate over 500 persons, over 95 percent of whom are United States citizens.

10. Virginia Code Section 28.1-60(3) precludes non-residents of this Commonwealth from fishing in Chesapeake Bay for menhaden by denying them a license for such activity. The statute provides that:

> A non-resident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of the straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided, such person, firm or corporation has applied for and obtained a license to take and catch such fish within the above-defined area and in accordance with the following requirements.

An application for such non-resident commercial licenses for the taking of menhaden is then outlined in Virginia Code Section 28.1-60(3) and provides that such licenses shall be granted after the Commissioner of Marine Resources is fully satisfied that the statements contained in said application are true. But Plaintiffs are denied the right to pursue menhaden into Chesapeake Bay even with a license because of their non-residency.

11. Furthermore, Virginia Code Section 28.1-81.1 which was passed as special "emergency" legislation during the 1975 session of the Virginia General Assembly and became effective March 19, 1975 states that:

> (a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.
>
> (b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five percentum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.
>
> (c) Seventy-five percentum of the interest in a corporation shall be deemed to be owned by citizens of the United States (i) if the title to seventy-five percentum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five percentum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five percentum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

12. On May 22, 1975, Plaintiff Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license as it had routinely done in the past. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Marine Resources Commission, Smith Meal was informed that such licenses were not available to corporations held directly or indirectly by foreign interests, citing Virgina Code Section 28.1-81.1. Pursuant to said statute, if same is valid, Smith Meal can no longer obtain a license to take menhaden as Smith Meal is not a citizen of the United States within the meaning of said statute.

13. The commercial menhaden industry in the United States is divided primarily among three corporations which account for the bulk of the menhaden fishing which is done in this country. Zapata Haynie Corporation is the largest of these organizations in terms of volume. Plaintiff Seacoast is the second largest, while Standard Products Company, Inc. is third. Both the first and third largest menhaden fishers are *domestic Virginia corporations.* The newly enacted law would apply to the only one of said corporations which is not a Virginia corporation and would preclude only

Seacoast and its subsidiaries from fishing in Virginia's territorial waters.

14. Virginia Code Section 28.1-81.1 and those portions of Section 8.1-60(3) precluding non-residents from fishing for menhaden in Chesapeake Bay violate the rights of the Plaintiffs under the Constitution of the United States and the Amendments thereto in the following particulars:

(a) They deprive the Plaintiffs of the equal protection of the laws, in violation of the provisions of Article XIV, Section 1 of the Amendments to the Constitution of the United States;

(b) They deprive the Plaintiffs of liberty and property without due process of law, in violation of the provisions of Article XIV, Section 1 of the Amendments to the Constitution of the United States.

(c) They impose an unreasonable restriction on interstate commerce in violation of the Commerce Clause, Article 1, Section 8 of the Constitution of the United States.

15. As noted, the height of the menhaden fishing season occurs during the summer months. Hence, plaintiffs will suffer substantial losses unless they are afforded an immediate preliminary injunction which would be effective until these matters have been resolved.

Wherefore, the Plaintiffs demand judgment against the Defendant and pray that the Defendant may be both temporarily and permanently restrained and enjoined from enforcing the aforesaid provisions of the statutes of Virginia hereinbefore complained of, and that this Court may enter a Declaratory Judgment in accordance with the provisions of the United States Code, Title 28, Sections 2201 and 2202, declaring that the provisions of said statutes of

Virginia are null, void and have no effect, as being a contravention of the applicable provisions of the Constitution of the United States and Amendments thereto. The Plaintiffs also hereby make application for a preliminary injunction, pending a final hearing of said action upon the merits, restraining and enjoining the Defendants from enforcing or attempting to enforce such statutes, and pray that said application for a preliminary injunction be heard in accordance with the provisions of United States Code, Title 28, Sections 2281-2284, inclusive, upon the earliest practicable day and that the necessary three-judge Court may be forthwith convened for the purpose of hearing said application.

Seacoast Products, Inc.,
Second Oceanic Corporation, and
The New Smith Meal Company, Inc.

By /s/ T. H. Willcox, Jr.
Of Counsel

T. H. Willcox, Jr., Esq.
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1800 Virginia National Bank Building
Norfolk, Virginia 23510
Attorneys for Plaintiffs

[Certificate of service omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

MOTION FOR ISSUANCE OF EX PARTE RESTRAINING ORDER

Now comes the Plaintiffs, by counsel, and pursuant to Federal Rule 65(b), to move this Court for an *ex parte* restraining order enjoining the Defendant from enforcing Virginia Code Section 28.1-81.1 upon the grounds and for the reasons outlined in the Affidavit of David H. Clarke, President of Plaintiffs Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, attached hereto and made a part hereof.

Wherefore, Plaintiffs move for the issuance by this Honorable Court of such an *ex parte* restraining order under the provisions of Rule 65(b). Notice of the presentation of this application has been given to the Defendant.

Seacoast Products, Inc.,
Second Oceanic Corporation and
The New Smith Meal Company, Inc.

By /s/ Thomas H. Willcox, Jr.
Of Counsel

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1800 Virginia National Bank Building
Norfolk, Virginia 23510
Attorneys for Plaintiffs

[Certificate of service omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

ANSWER

Comes now the defendant, James E. Douglas, Jr., Commissioner of Marine Resources of the Commonwealth of Virginia, by counsel, and in response to the Complaint and Motion for Preliminary Injunction, represents as follows:

1. The allegations contained in paragraphs 1, 2 and 3 are admitted.

2. The allegations contained in paragraphs 4, 5, 6, 7, 8, and 9 are neither admitted nor denied.

3. The allegations contained in paragraphs 10, 11 and 12 are admitted.

4. The allegations contained in paragraph 13 are neither admitted nor denied.

5. The allegations contained in paragraph 14 are denied.

6. The allegations contained in paragraph 15 are neither admitted nor denied.

James E. Douglas, Jr.

By: /s/ James E. Moore
Counsel

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

MOTION TO ABSTAIN

Comes now the defendant, James E. Douglas, Jr., Commissioner of Marine Resources of the Commonwealth of Virginia, by counsel, and moves this Court for entry of an order staying any further proceedings in this Court until the Supreme Court of Virginia has been afforded the opportunity to determine the issues here presented with respect to construction and constitutionality of the statutes in question. In support thereof, the defendant represents the following:

1. The statutes here in question are laws of the Commonwealth of Virginia which have not been interpreted or judged as to their constitutionality in the Courts of the State of Virginia.

2. There are various procedural means, under Virginia law, which would afford the plaintiffs means for obtaining state court review and interpretation of the statutes in question. See § 28.1-33, § 8-578, § 8-704, Code of Virginia (1950), as amended.

Respectfully submitted,

James E. Douglas, Jr.

By: /s/ James E. Moore
Counsel

[Certificate of service omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move upon the annexed affidavit of David H. Clarke and the pleadings herein under Rule 56 of the Federal Rules of Civil Procedure for entry of Summary Judgment for Plaintiffs.

Seacoast Products, Inc.
The New Smith Meal Company, Inc.
Second Oceanic Corporation

By /s/ T. H. Willcox, Jr.
Of Counsel

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Norfolk, Virginia 23510

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 75-69-NN
(Three-Judge Court)

Seacoast Products, Inc., The New Smith Meal Company, Inc. and Second Oceanic Corporation,

Plaintiffs,

v.

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission,

Defendant.

FINAL ORDER

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, Adjudges, Orders and Decrees:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained:

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any of them is hereby restrained and enjoined fro mthe enforcement against the plaintiffs or any of them of the statutes designated as

Code of Virginia §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiffs recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 75-69-NN

Seacoast Products, Inc., The New Smith Meal Company, Inc. and Second Oceanic Corporation,

Plaintiffs,

v.

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission,

Defendant.

Three-Judge Court

Argued: October 15, 1975 Decided: November 7, 1975

Before Bryan, Senior Circuit Judge, Kellam, District Judge and MacKenzie, District Judge.

T. H. Willcox, Jr., of Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Virginia, counsel for plaintiffs; James E. Moore, Assistant Attorney General [Andrew P. Miller, Attorney General], Richmond, Virginia, counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three miles[1] of her coast. Plaintiff, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virgina *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights

---

[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 US 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 USC 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 USC 2281 and 2284.

[3] There are no critical, genuine factual differences betwen the parties.

under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention have no place. In other circumstances they are appropriate: to obtain interpretation of a State statute, Railroad Commission v. Pullman Co., 312 US 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 US 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 US 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 US 592, 602 (1975); *Younger,* supra, at 53-54; Swickler v. Koota, 389 US 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not purposed

to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 US 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any

state' on an equality of legal privileges with all citizens under non-discriminatory laws.

Incidentally, the Court in both *Takahashi,* supra, at p. 420, and in Toomer v. Witsell, 334 US 385, 401 (1948) declined to treat, as *contra,* McCready v. Virginia, 94 US 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 USC 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . ,"except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 US 385, 393, 394 (1948); United States v. California, supra, 332 US 19 (1947); Skiriotes v. Florida, 313 US 69, 75 (1941); Manchester v. Massachusetts, 139 US 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 USC 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 USC 808, 839. He acted

only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters agains depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-mile sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester,* supra—determined Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall

and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiff's ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 US 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 US 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effecting this opinion.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

AFFIDAVIT OF DAVID H. CLARKE IN SUPPORT OF PLAINTIFFS' MOTION FOR ISSUANCE OF RESTRAINING ORDER

I, David H. Clarke, of the Town of Highlands, County of Monmouth, and State of New Jersey, being duly sworn on oath, depose and say:

1. I am President of each of the Plaintiff corporations, Seacoast Products, Inc. (hereinafter referred to as "Seacoast"), The New Smith Meal Company, Inc. (hereinafter referred to as "Smith Meal"), and Second Oceanic Corporation (hereinafter referred to as "Oceanic").

2. Plaintiff Seacoast is a corporation organized under the laws of the State of Delaware and has a principal place of business at Port Monmouth, in the State of New Jersey. Plaintiff Smith Meal is a corporation organized under the laws of the Commonwealth of Massachusetts and likewise has a principal place of business at Port Monmouth, in the State of New Jersey. Oceanic is a corporation organized under the laws of the State of New York and has a principal place of business at Amagansett, in the State of New York. Plaintiffs Smith Meal and Oceanic are wholly-owned subsidiaries of Plaintiff Seacoast.

3. I am in charge of the operations of Seacoast and its subsidiaries. I was raised in and have spent all of my com-

mercial life in the business of menhaden fishing and processing and am fully familiar with the facts set forth herein.

4. Menhaden is a species of non-edible, migratory fin fish. From January to March, Atlantic menhaden concentrate in offshore waters from Cape Hatteras to Florida. In March they move inshore and begin a northward migration. This migration extends beyond Cape Cod, with the oldest fish traveling the furthest north. In the autumn months they reverse their paths, finishing the return trip and moving offshore by January. This completes their annual cycle.

5. During their summer migration, menhaden remain close to the shorelines. They are estuarine dependent species and thence spend most of their life cycle, with the exception of the annual winter offshore concentration, in coastal areas.

6. Fishing for menhaden is commercially feasible only during their summer migration, when they are close to the shore. During this phase of their cycle, they travel in large, closely packed schools. More than 80% of all menhaden are caught within three miles of shore.

7. Commercial fishing for menhaden is accomplished by using a type of net known as a purse seine which surrounds the school of menhaden and is drawn closely at the bottom traping the fish which are then pumped into refrigerated holds on the boat. The fish are not processed aboard ship.

8. Menhaden is the leading species of fish used for industrial purposes, and the menhaden industry is the largest fishery in the United States. The catch is processed into three products: fish meal, fish oil and fish solubles. Fish meal is used principally for poultry feed, fish solubles in animal feeds, and fish oil is mainly exported to Europe and Canada for use in the maufacture of margarine. Fish meal is

also used by pharmaceutical companies in the manufacture of antibiotics.

9. The business of Seacoast and its subsidiaries constitutes a major segment of the American menhaden industry. The right of the Plaintiffs to fish in Virginia's territorial waters is of great value to them. Menhaden caught in said territorial waters in recent years has had a value substantially in excess of $10,000.00 each year for each plaintiff. In recent years prior to the year 1975, non-resident fishing licenses have been routinely obtained from the State of Virginia. The business and income of Seacoast and its subsidiaries will be lessened in the absence of the catch of menhaden to be taken in Virginia waters during the coming summer months, the fishing season having already commenced.

10. During its 1975 session, the Virginia General Assembly passed special "emergency" legislation, effective March 19, 1975, which is presently embodied in Virginia Code Section 28.1-81.1 and which precludes non-citizens, including corporations ultimately owned by the corporate chain by non-citizen corporations, from obtaining licenses to fish in the territorial waters of the Commonwealth of Virginia.

11. On May 22, 1975, Plaintiff Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Marine Resources Commission, Smith Meal was informed that such licenses were not available to corporations, such as Smith Meal, held directly or indirectly by foreign interests, citing said Virginia Code Section 28.1-81.1.

12. The right of Plaintiffs to follow the schools of menhaden in their progress off the Atlantic Coast, including the right to do so within the territorial waters of the State of Virginia, and the right freely to take or fish for them wherever they may be found, are rights of great value to Plaintiffs, and if they are forbidden to exercise them during the coming summer months, they will sustain great and irreparable injury.

13. It is therefore imperative that Plaintiffs be awarded an immediate restraining order preventing the enforcement of Virginia Code Section 28.1-81.1 until adequate legal steps may be taken to challenge the constitutionality of said statute and to prevent its enforcement prior to a final determination on the merits of its constitutionality.

/s/ David H. Clarke
David H. Clarke

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

AFFIDAVIT OF DAVID H. CLARKE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, David H. Clarke, of the Town of Highlands, County of Monmouth, and State of New Jersey, being duly sworn on oath, depose and say:

1. I am President of each of the Plaintiff corporations, Seacoast Products, Inc. (hereinafter referred to as "Seacoast"), The New Smith Meal Company, Inc. (hereinafter referred to as "Smith Meal"), and Second Oceanic Corporation (hereinafter referred to as "Oceanic").

2. Plaintiff Seacoast is a corporation organized under the laws of the State of Delaware and has a principal place of business at Port Monmouth, in the State of New Jersey. Plaintiff Smith Meal is a corporation organized under the laws of the Commonwealth of Massachusetts and likewise has a principal place of business at Port Monmouth, in the State of New Jersey. Oceanic is a corporation organized under the laws of the State of New York and has a principal place of business at Amagansett, in the State of New York. Plaintiffs Smith Meal and Oceanic are wholly-owned subsidiaries of Plaintiff Seacoast.

3. I am in charge of the operations of Seacoast and its subsidiaries, being raised in and having spent all of my commercial life in the business of menhaden fishing and processing. I am fully familiar with the facts set forth herein.

4. The three largest menhaden fishing companies in the United States, in the order of size, are Zapata Haynie Corporation, Seacoast Products, Inc. and Standard Products, Inc. Unlike Seacoast the other two companies are not alien owned. Also unlike Seacoast, the other two companies both have plants in Virginia and are engaged in fish catching and processing in that State.

5. The business of Seacoast was started in Port Monmouth, New Jersey in 1911 by J. Howard Smith. After his death in the early 1950's, ownership of the business passed to his children and a son-in-law (the "Smith Family"). The business was sold by the Smith Family in December 1973 to a Delaware corporation ultimately controlled by Hanson Trust Limited, a United Kingdom corporation.

6. Prior to the sale to Hanson, the Smith Family had endeavored unsuccessfully for four years to sell Seacoast. Hanson Trust Limited is engaged through various subsidiaries in the business of manufacturing building materials, construction supplies and other industrial equipment and providing industrial and agricultural services as well as services connected with property investment and development. Prior to the purchase of Seacoast, Hanson was not engaged, directly or indirectly, in any aspect of fishing or fish processing or in owning or operating any fleets.

7. In the fall of 1973, Hanson sold two of its United Kingdom subsidiaries to United States corporations (Cummins Engine Co., Inc. and Peabody Galion Corp.) for an aggregate purchase price in excess of $30,000,000.00. Hanson then sought to reinvest these proceeds in the United States economy and requested its American bankers to suggest investment opportunities in this country. One of the American bankers called upon by Hanson was Kuhn Loeb & Co. which was then acting in behalf of the Smith Family in

their efforts to sell Seacoast. After the consummation of the Seacoast sale, Hanson Trust made additional investments in other United States businesses, none of which are related in any way to the fishing industry.

8. Seacoast itself is a United States corporation and its operations should not be confused with the case of foreign fishing fleets not subject to the jurisdiction of the United States. Ultimate alien stock ownership of Seacoast, a Delaware corporation, in no way affects United States control over the corporation as to any laws or regulations the United States has imposed, or may seek to impose, on domestic corporations and/or on the fishing industry as a whole.

9. In addition, the transfer of ownership of Seacoast from the Smith Family resulted in no change in Seacoast's mode of operations. The officers and directors of Seacoast, all of whom are United States citizens, are the same persons who operated the business before the sale. Additionally, the captains and crews of the vessels, numbering about 490 persons, are all United States citizens, and more than 95 percent of the approximately 500 persons employed in plant operations are United States citizens.

10. In connection with the purchase of Seacoast by the British-controlled Delaware corporation, the vessels owned by Seacoast were temporarily transferred to Mr. Richard Reiss, a citizen of the United States. This was done because, under present law, transfer to a foreign-owned corporation of majority control of a United States company operating United States-documented fishing vessels requires the approval of the Maritime Administration of the Department of Commerce. The vessels were transferred to Mr. Reiss to be held by him subject to the outcome of such an application to the Secretary of Commerce.

11. This application was made in January of 1974 by Mr. Reiss pursuant to 46 U.S.C. Sections 808 and 835 for approval by the Secretary of Commerce to the retransfer by Mr. Reiss to Seacoast of 68 vessels owned by Seacoast immediately prior to the sale of the business to the Delaware corporation controlled by Hanson Trust.

12. The Reiss application was forwarded by the Maritime Administration to the National Oceanic and Atmospheric Administration (NOAA) for investigation and comment. In a public statement dated October 16, 1973, NOAA announced its interim policy as to foreign investments in U.S. fishing companies in part as follows:

> NOAA will investigate and evaluate each application on its individual merits with consideration being given to, among other things, the impact of the proposed transaction on (a) conservation and management of the fisheries resources, (b) the employment of United States citizens, (c) United States consumers, (d) competition, and (e) other social and economic factors. In doing this, NOAA will review and evaluate the operational plans of the company as well as the extent of foreign investment in the particular fishery in which the company plans to operate.

13. NOAA scheduled a public hearing on the Reiss application, and comments on the application were solicited by that organization. Notice of the hearing was widely publicized by various means, including the Federal Register. Moreover, the Director of National Marine Fisheres Service wrote to over sixty individuals and organizations involved in the commercial fishing industry, or who might otherwise be interested, advising them of the scheduled hearing and inviting their comments on the application.

14. The public hearing, the first of its nature, was held on March 20-21, 1974 and covered the subjects with which NOAA was particularly concerned as outlined in its interim statement of policy aforesaid. At the outset of the hearings, the Chairman stated (Transcript, Page 8):

> As I previously indicated, the focus of this hearing will be on the fishery aspects of the proposed transfer.
>
> We will further address such considerations as the possible effects of the transfer upon (1) the Menhaden resource involved; (2) the aggregate of fishing/processing companies on whose behalf the transfer is sought; (3) upon the Menhaden segment of the commercial fishing industry and (4) upon consumers of fish meal, fish oil, and fish solubles which these companies have produced.

15. During the hearings, statements were made in support of the application by various representatives of Seacoast and opposing statements were made by its competitors, Zapata Haynie Corporation and Standard Products, Inc. The hearings on the Reiss application to retransfer 68 vessels to Seacoast resulted in a favorable recommendation to the National Marine Fishery Service which in turn made its recommendation to the Maritime Administration. In so doing there was the necessary finding that the application was consistent both with protection of the fisheries, one of the paramount concerns set forth by NOAA, and also with United States social, economic and other interests.

16. The Department of Commerce (through the Administrator of Maritime Administration) granted the Reiss application. The Department is authorized by law, if it grants such approval, to grant same "either absolutely or upon such conditions as the Secretary prescribes." 46 U.S.C. Sec-

tion 839. The approval in point was granted *unconditionally*.

17. Thus, as previously noted, Seacoast and its subsidiaries, the New Smith Meal Company, Inc. and Second Oceanic Corporation, are all United States corporations owned directly by other United States corporations, all paying taxes in this country, subject to all of the maritime and other laws enacted in this nation, employing almost exclusively United States citizens, run by boards of directors and officers, all of whom are United States citizens, processing all of their menhaden catch in this country and marketing all of their products here except for edible fish oil which is precluded from sale by United States laws and which is sold in Europe.

18. Menhaden is a species of non-edible, migratory fin fish. From January to March, Atlantic menhaden concentrate in offshore waters from Cape Hatteras to Florida. In March they move inshore and begin a northward migration. This migration extends beyond Cape Cod, with the oldest fish traveling the furtherest north. In the autumn months they reverse their paths, finishing the return trip and moving offshore by January. This completes their annual cycle.

19. During their summer migration, menhaden remain close to the shorelines. They are estuarine dependent species and thence spend most of their life cycle, with the exception of the annual winter offshore concentration, in coastal areas.

20. Fishing for menhaden is commercially feasible only during their summer migration, when they are close to the shore. During this phase of their cycle, they travel in large, closely-packed schools. My experience has been that the great bulk of the menhaden Plaintiffs have taken over the years have been caught within two miles of the shoreline.

21. Commercial fishing for menhaden is accomplished by using a type of net known as a purse seine which surrounds the school of menhaden and is drawn closely at the bottom trapping the fish which are then pumped into refrigerated holds on the boat. The fish are not processed aboard ship.

22. Menhaden is the leading species of fish used for industrial purposes, and, in terms of landed tonnage, the menhaden industry is the largest fishery in the United States. The catch is processed into three products: fish meal, fish oil and fish solubles. Fish meal is used principally for poultry feed, fish solubles in animal feeds. Fish oil is used domestically for industrial purposes and also is exported to Europe and Canada for use in the manufacture of margarine. Fish meal is also used by pharmaceutical companies in the manufacture of antibiotics.

23. The business of Seacoast and its subsidiaries constitutes a major segment of the American menhaden industry. The right of the Plaintiffs to fish in Virginia's territorial waters is of great value to them. The total tonnage of menhaden caught in said territorial waters in recent years has been substantial, being certainly in excess of $10,000.00 for each of the individual Plaintiffs over the past years, during which years, commercial fishing licenses have been routinely obtained from the State of Virginia. The business and income of Seacoast and its subsidiaries will be materially lessened in the absence of the catch of menhaden to be taken in Virginia waters.

24. Late in the year 1974, the Honorable Thomas N. Downing of Virginia introduced House Bill 17048 to prevent American-registered vessels from fishing in U.S. waters if such vessels are owned by a corporation controlled directly or indirectly by foreign interests. This bill was not enacted.

Mr. Downing reintroduced his proposed legislation on March 11, 1975 in House Bill 4612, which, unlike its predecessor, contained a "grandfather clause" excluding from its application U.S. registered vessels owned by the prohibited corporations if such U.S. registration existed at the time of the passage of the proposed legislation. The new bill also has not been enacted.

25. Your affiant is informed and believes and therefore avers that during its 1975 session, the Virginia General Assembly passed special "emergency" legislation, effective March 19, 1975, which is presently embodied in Virginia Code Section 28.1-81.1 and which precludes non-citizens, including corporations ultimately owned or controlled by non-citizen corporations, from obtaining licenses to fish in the territorial waters of the Commonwealth of Virginia. The Virginia law prohibits Seacoast from fishing in Virginia waters although Federal law imposes no such bar.

26. On May 22, 1975, Plaintiff Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Marine Resources Commission, Smith Meal was informed that such licenses were not available to corporations, such as Smith Meal, held directly or indirectly by foreign interests, citing said Virginia Code Section 28.1-81.1.

27. In addition to the foregoing, plaintiffs separately contest in this action another Virginia statute which has been in force for a number of years, (presently embodied in portions of Virginia Code 28.1-60(3)), prohibiting non-resident fishermen, individual and corporate, from fishing for menhaden within the confines of Chesapeake Bay,

west of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting same into oil, fish scrap, fish meal or guano. Plaintiffs contend they are thereby wrongfully prevented from fishing for menhaden in Chesapeake Bay which is the most productive source for the catch of menhaden in Virginia waters.

28. The right of Plaintiffs to follow the schools of menhaden in their progress off the Atlantic Coast, including the right to do so within Chesapeake Bay and the other territorial waters of the State of Virginia, and the right freely to take or fish for them wherever they may be found, are rights of great value to Plaintiffs, and if they are forbidden to exercise them, they will sustain great and irreparable damages.

29. I know of no disputed issue of fact to be tried, and I know of no defense to this action. I, therefore, respectfully submit that Summary Judgment for Plaintiffs should be entered herein and that Defendant should be enjoined from enforcing said statutes as prayed and this Honorable Court should grant such other relief as may be just.

/s/ David H. Clarke
David H. Clarke

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

STIPULATIONS STATED BY COUNSEL IN OPEN COURT

Norfolk, Virginia
October 15, 1975

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* * *

[2] Mr. Moore: Your Honor, I think we can state for the record—and Mr. Willcox can correct me if I'm wrong —that:

Mr. C. H. Crockett, who is a boat captain and patrols the offshore waters of Virginia in the three-mile limit, would testify that in the 1974 fishing season, the only season in which he has been employed with the Commission, which would be relevant to this proceeding, that he did not see the Seacoast fishing vessels operating in Virginia waters for purposes of fishing.

We would have testimony from Mr. William M. Sklar,—S-k-l-a-r—who is a fish spotter for Zapata Haynie Corporation, who has been a fish spotter for 10 years with Zapata and eight years previously with another company. He would testify that he is fully able to recognize the various boats of different companies and he has during the last three seasons seen no fishing by vessels owned by Smith and Company or Seacoast. He would also testify that in years past,

running back for eight to 10 years, I believe he said, that there has been substantially little or no fishing by [3] Smith and Company or Seacoast.

Mr. George T. Edwards, also a fish spotter for Zapata Haynie for eight years, and eight years previously with another company, would indicate that he has in the past three seasons seen Seacoast vessels only rarely in Virginia waters engaged in fishing, but that in years past, perhaps 15 years past, Smith and Company, now Seacoast, did engage in some fishing of a substantial nature in Virginia waters.

Is that—

Judge Bryan: Thank you, Mr. Moore.
Mr. Willcox.

Mr. Willcox: I would like to add to that, your Honor, that both Mr. Sklar and Mr. Edwards are employees of Zapata Haynie Corporation, which is mentioned in the affidavits and briefs; that Mr. Edwards, I believe, would testify that the quantity of menhaden fish available in Virginia waters has dropped significantly in the last three or four years and is continuing to drop, and I believe he said that was true generally of the Atlantic Coast fisheries, save for the Southport, North Carolina area, which this year experienced some increase. They would—

Judge MacKenzie: Is that quantity, you said, quantity of fish?

[4] Mr. Willcox: Quantity, yes, sir, of menhaden fish.

I believe that they would also verify, for what it's worth, your Honor, that the men, the Captains and crews of the plaintiffs' boats, are largely Virginians resident in the Reedville area, and I believe that two of these gentlemen, Mr. Crockett and Mr. Edwards, formerly worked for the plaintiffs in the menhaden fishery themselves.

May I have just a moment?

Judge Bryan: Yes.

Mr. Willcox: May it please the Court, we have one further stipulation, bearing on the same subject matter, which is that Mr. Clarke, if asked, would testify that a full boatload of fish, average boat size, on today's market is worth about $80,000 and that even with the refrigerated equipment available on the boats today that menhaden would begin to deteriorate, begin to spoil, after about a week.

Judge Bryan: All right, sir.
Mr. Moore, do you have any disagreement with that?

Mr. Moore: We would agree that he would testify to that; yes, sir.

Judge Bryan: All right.

Mr. Moore: We would like, for the purposes of the information of the Court, to clarify that Mr. Dougles, the [5] defendant, is Chairman of the United States Marine Fisheries Conference, and that weighs upon his inability to be here, your Honor.

Judge Bryan: There is no question that as much as $10,000 and more is involved in this case, is there?

Mr. Willcox: I don't think so, your Honor.

Mr. Moore: No, sir.

This is with regard to the appropriateness of an injunctive relief. That's why we intended to introduce this evidence.

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

* * *

DEPOSITIONS UPON ORAL EXAMINATION OF JAMES E. DOUGLAS, JR. AND W. JACKSON DAVIS, TAKEN OF BEHALF OF THE DEFENDANT

Newport News, Virginia

October 27, 1975

Appearances:

Willcox, Savage, Lawrence, Dickson & Spindle

By: Thomas H. Willcox, Jr., Esquire
James C. Howell, Esquire
Counsel for the Plaintiffs

James E. Moore, Esquire
Assistant Attorney General
Counsel for the Defendant

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[2] Depositions upon oral examination of James E. Douglas, Jr. and W. Jackson Davis, taken for de bene esse purposes on behalf of the defendant, before Richard W. Zahn, CSR, a Notary Public for the Commonwealth of Virginia at Large, taken pursuant to agreement of counsel, commencing at 2:00 P.M. on the 27th day of October, 1975, at the offices of the Virginia Marine Resources Commission, Newport News, Virginia; and these in accordance with the Federal Rules of Civil Procedure.

JAMES E. DOUGLAS, JR., a defendant, was sworn and deposed on behalf of the defendant, as follows:

Direct Examination

By Mr. Moore:

Q Mr. Douglas, what is your position with the Commonwealth? A I am Commissioner and Chairman of the Marine Resources Commission.

Q And as Commissioner, you are responsible for the conservation and management of the fisheries of the Commonwealth? A Yes. Marine fisheries of the Commonwealth, I should say, as distinguished from upland fisheries.

Q Which, if any, other boards and commissions relative to fisheries and conservation fisheries do you participate on and serve on? [3] A Commissioner of Potomac River Fisheries Commission, which is a joint regulatory fisheries in the Potomac and Maryland. Commissioner and past

Chairman of the Atlantic States Fisheries Commission, which is a 15-state interstate fisheries compact on the East Coast. And that would be all dealing with domestic fisheries.

I am an alternate Commissioner to the International Commission Northwest Atlantic Fisheries, which is an 18-nation international fisheries convention to which the United States is a party, managing fisheries off the northwest Atlantic, which gets me confused, but northwest Atlantic is off the East Coast of the United States.

Q Have you served as a technical adviser to any United States treaty delegations dealing with fisheries treatises? A Yes. Specifically, one of the Soviet-United States bilateral negotiations—I forget the date, but they were held in Moscow some two or three years ago. I also served as an adviser to the State Department relative to the fisheries matters.

Q Prior to the enactment of Section 28.1-81(1), this was enacted, I believe, by the 1975 General Assembly. What are the requirements for obtaining commercial fishing licenses in Virginia by corporations? A Well, where a corporation was permitted a license basically, the only requirement was that they be—there was a [4] residency requirement, both in terms of the residency versus nonresidency interest in the corporation, and whether the corporation was in fact a Virginia corporation.

Q And would that— A That varies from license to license, you understand. But as a general statement, unless you want a specific license, that is generally true.

Q Would it be fair to say then, as a general statement, in order for a corporation to obtain commercial fishing licenses in Virginia, it need be a resident Virginia corporation, that being a corporation organized under the laws of Virginia? A Yes. I think as a general statement.

Q All right, sir. In the passage of Section 28.1-81.1, which precludes aliens from obtaining commercial fishing licenses, was the grandfather clause aspect considered by the Legislature, or by the committee?

Mr. Willcox: I object to that. This is hearsay unless we limit ourselves to what this particular witness himself did or said. Certainly he is not competent to tell us, nor would it be proper evidence as to the deliberations of the committee.

Mr. Moore: We will withdraw that question and begin again.

[5] By Mr. Moore:

Q During your appearances before committees of the General Assembly, with regard to this specific bill, 28.1-81.1, were you asked questions regarding what, if any, present fishery companies operating in Virginia would be affected by this legislation? A Yes. I recall distinctly that that question was asked, what effect, and what companies it would affect. I can recall at that time advising, I believe it was the Senate committee, but I wouldn't want to be certain on that, that to the best of my knowledge, the provisions of this bill would affect only one firm that had previously been doing some fishing in Virginia. But it would preclude the type of fishing that they had previously been doing.

Q All right, sir. What company was that? A I don't believe we indicated the company at the time, but it would be the Seacoast, the Old Smith Meal menhaden firm which was sold to some British interests.

Q Were you asked at the time of your testimony before these General Assembly committees, were you asked whether

or not that company which would be affected was engaged in a substantial amount of fishery activity in Virginia waters? A I think there was some reference to it. Of course, at that time this firm would have been limited anyway, because of it being a nonresident, to offshore of a line drawn between Cape [6] Charles and Cape Henry. And they had, when it was Smith Meal, had a license on some handful of vessels, three, four, five, six—I don't have the exact data before me now—to fish in that three-mile limit which was provided for by Virginia law.

Q Are you familiar with National Marine Fisheries Service statistics for the period from 1972 to 1973, which would show Virginia landings of certain species taken off the Virginia coast? A Yes.

Q Now, you can refer to those statistics if you like, A It is published information on the Department of Commerce.

Q I ask you to refer to those statistics in front of you. With regard first to the—well, first of all, indicate to us the four species that were contained in that series of statistics which are taken in offshore waters from the Virginia coast. What four species? A The four species, and where I am reading them, as I know you and Mr. Willcox are aware, is previous statement of testimony before a Congressional committee concerning other bills. They were referring here to river herring, scup, sea bass, and butterfish.

Q All right, sir. Why were these four species selected for your presentation before Congress? A Well, they represent four species that are very important to Virginia fishermen. They represent species that [7] indeed range out beyond our territorial waters, and are subject to foreign fishing effort.

Q What foreign fishing effort? What type foreign fishing effort do you speak of? A Foreign fishing effort by primarily, during these years, primarily Soviet fishing vessels and Polish fishing vessels, although many other nations were involved, I am positive, during those years, including Spanish, Japanese, the German Democratic Republic, East Germans, as we call them, West Germany, F.R.G. Almost all of the nations that are fishing, that might be fishing under the ICNWF, which, incidentally, is the alphabetical nomenclature of International Commission Northwestern Fisheries, if you will allow me to use ICNWF. Almost all the vessels fish in this area known as statistical area 5 and 6 under ICNWF. All of the countries I mentioned have vessels in the area, and primarily, though I would say that the major effort came on the part of Soviets, Poles, and of late, German Democratic Republic.

Q Is it fair to say those four species, river herring, scup, butterfish and sea bass, are all species caught in the waters off Virginia's coast, but in the waters outside the exclusive fishery zone of the United States, and therefore are subject to foreign fishing? A Yes. Both in and out of that 12-mile zone.

Q All right, sir. Turning your attention now to [8] statistics on river herring, what—

Mr. Willcox: May I ask, so I will understand what he is saying, are these statistics only applicable to fish caught beyond the 12-mile limit?

The Deponent: No, sir. Let me explain. These will be total landings in Virginia. Now, I will say to you that it doesn't necessarily mean that Virginians landed them all, though most landings in Virginia are by Virginia fishermen. But it is tonnage of these species that are landed in Virginia

ports. They may or may not have been caught in or outside of the 12-mile zone. The Department of Commerce figures do break this down by area in which this thing is caught, if you are interested in that. I don't have that right in front of me, but all of these species are subject to being taken, clearly subject to being taken beyond 12 miles, which is the contiguous fishery zone where the United States exercises exclusive fishery control.

Mr. Willcox: And is it possible to tell whether they are caught within or without the three-mile limit?

The Deponent: I don't know whether the statistics break that down or not, Mr. Willcox, but I can find that out. My statistician can tell me. I am pretty positive it breaks it down by the 12-mile limit. It does have a geographical breakdown, if you need that.

[9] Mr. Willcox: But the figures you are going to give us are merely the number of tons of fish that came to Virginia ports, no matter who they were caught by nor where they were caught?

The Deponent: They would have been caught by some domestic fishermen.

Mr. Willcox: But they might have been caught off North Carolina, or Maryland, as well as off Virginia?

The Deponent: That is correct.

By Mr. Moore:

Q Pursuing Mr. Willcox's point a little further, do Virginia landings substantially indicate Virginia-based fishing operations? Are most landings in Virginia by fishermen who caught fish off Virginia waters? A Oh, yes. I think I could say that unhesitatingly, simply because of the nature of the fishing vessel and its abilities, or inabilities to range very

far. I don't think there is any question generally about that. There are some Carolinians, for example, that land in Hampton Roads ports. I am sure there must be some Marylanders that land in Chincoteague ports. By the same token, I am sure there are some Virginians landing in North Carolina, and there are some Virginians that are landing in Maryland. I don't know whether it washes itself out, you know, how accurate or important that is to you to zero in on this specifically. You asked about Virginian vessels. We do have [10] statistics on the number of vessels that are landed, and the number of trips, and so forth, of vessels that land in Virginia. I don't have it broken down by state.

Q Turning your attention now to the statistics, National Marine Fisheries statistics. With regard to river herring landed in Virginia for the period 1973 through 1972, can you indicate from those statistics what the average yearly landing in terms of pounds of river herring was? A Yes. The 10-year average was 24.8 million pounds.

Q Do you have there statistics which indicate the 1973 landings in terms of percentages of the average 10-year landing? A Yes. The 1973 landings were 9.2 million, which, by my calculation, shows that to be 37 percent of the 10-year average.

Q Do you consider that to be a significant decrease? A Absolutely.

Q I turn your attention now to the species scup. Same statistics. Are these caught in waters off Virginia's coast also? A Yes, sir.

Q All right, sir. A The 10-year average, '63 to '73 on scup is 5 million pounds. The '73, 1973 landings, 825,000. That represents 16 percent of the 10-year average. '73 landings are [11] 16 percent of the previous 10-year average.

Q That is then an 84 percent decrease? A Yes.

Q In 1973, as compared— A From the 10-year average.

Q From the 10-year average. All right.

I turn your attention now to sea bass, and the same comparison, if you can make that. A All right. In sea bass, the 10-year average, same years, '73, '72, 2.2 million pounds. In 1973, it was only 1.2 million pounds, and that translates itself into being only 57 percent of the previous 10-year average, or 43 percent decrease.

Q And finally, the butterfish. A The 10-year average on butterfish is almost 1.3. Perhaps I should say 1.29. In 1973, it was 199,000 pounds, and that would represent only 15 percent of the previous 10-year average, or an 85 percent decline.

Q Would you think it fair to say then that these four species have suffered substantial decreases in their availability for catch? A Yes, based on those percentage decreases.

Q Has there been in recent years any significant decrease in the total fishing effort offshore in Virginia which might account for these substantial decreases? A To the best of my knowledge, bearing in mind that [12] the state does not license, does not require a license of a vessel to fish outside of its territorial seas, so we don't have absolute statistics. To the best of my knowledge, the offshore trawl fleet in Virginia is probably slightly less today than it was say 10 years ago.

However, I don't have any hesitation any way in saying to you that that decrease in fishing vessels could possibly account for that decrease in landings over catch.

Q It would, or would not? A It could not if the landings and the catch were synonymous. Something other than just the fact that we have a few vessels going out there is, in my opinion, obviously has to bear some of the blame.

Q Now, turning your attention to these four species, river herring, scup, butterfish and sea bass, are these species which are either intentionally or unintentionally taken by foreign fishing fleets fishing in offshore waters? A Let me take them in another order. In the instance of scup, we have some evidence by virtue of discussion with National Marine Fisheries people, and overflights, boardings of foreign vessels by Federal people, Coast Guard, National Fisheries Service, that in the late '60's, I would say, some Soviet vessels did venture down South in our area for scup directly. We then have further evidence, based again on the same sampling and approach, as I just mentioned, of boardings, [13] overflights and so forth, that as the foreign fishing fleet came into this area more concerned with silver hake, sea herring, and mackerel, that they began taking river herring, sea bass, butterfish, as well as scup, incidental to the catch of these other directed species.

We have an indication that once they got a lot of river herring as a by-catch, and that they subsequently seemed to direct an effort on river herring. I can only have a supposition they found out something to do with it.

Q When would this directed fishing on river herring by foreign fishing fleets have become, if you know? A We think it occurred approximately 1970, and that is obviously when the landings decreased also. But there are other factors involved, and Dr. Davis also can corroborate this, because the National Marine Fisheries Service man for this area is located at VIMS, and they keep extensive records on this.

But, let me go on and say, lest someone misunderstand when I talk about an incidental catch, or a by-catch of a directed fishery, like a directed fishery on mackerel, catching river herring or scup, the effort, fishing effort of foreign fishing, large foreign fishing fleets like the Soviets and Poles can merely, as a by-catch, catch greater tonnage of some of these by-catch species than the entire United States fishery directed to those species. That, I think, is a fact that can be borne out by ICNWF statistics, and State Department and Department of [14] Commerce fisheries. We are not talking about something incidental in its impact on the domestic fishermen. Let me make that plain.

Q Let me ask you again. When, and I am not sure we got this in the record. Approximately what period in time would you pinpoint as the time when there was an increased or directed effort by foreign interests at fishing by river herring? A We believe that occurred right in the late '60's and early '70's. Around 1969, '70.

Q Referring to National Marine Fisheries statistics, during what period of time is there shown the most dramatic decrease in landings of river herring?

From Virginia waters, or off the coast of Virginia waters? A Well, just running down it beginning in 1973 and continuing, it was 26 million, 26.6 million. 26.2. 28.5. 28.1. 32.3.

In 1969, 30.4.

In 1970, 19 million.

1971, 10.2.

1972, 10.4.

1973, 9.2.

So the decrease occurs between 1969 and '71, which statistically, we feel there is a correlation between those sta-

tistics and when the boardings, at least the reports back to [15] us that the boardings showed they were directing some effort on river herring.

Q Are you familiar with the term pulse fishing? A Yes.

Q What does that mean? A It is a term applied basically to how the foreign fishing effort goes. Where there is a very concentrated effort in a certain area until the stocks in that area are fished to the point where it is economically unfeasible, and you move on immediately.

Q I see. Does this pulse fishing have an ill effect upon fishery resources? A Well, if it is large enough, obviously, and we think the foreign fishing effort is, yes. It is not what most good conservationists would like to see, simply because it is, by its definition, a depleting of a given area at a given time.

Q You indicated previously that you have been technical adviser to United States delegations involved in treaty making regarding fisheries. Based upon your experience as a technical adviser, in your experience in fisheries management, is it your opinion that agreements, treaties and conservation measures in international waters have been successful in curbing pulse fishing practices and other predatory practices by foreign interests? A Well, first of all, it has not curbed pulse [16] fishing. It hasn't addressed itself to pulse fishing, first. However, it does address itself to the overall conservation of the resource, or the particular stocks in question. And the answer is that they have not been successful, at least based upon the assessment of the resulting stocks of those species they have purported to protect, they have not done so. The international agreements have not protected them. I think this is primarily because of

two reasons. First of all, we found—we, in this instance being the United States, have found it very difficult to achieve agreement as to the appropriate measures for conservation of a stock or biomass with the foreign nation or nations, whichever we might be dealing with.

Secondly, where we do get some agreement, it has been very difficult to enforce, in our experience—and again, I say that in terms of the United States—has been that these nations—well, there have been numerous instances of violations of the agreement. These are cited chapter and verse by the Coast Guard. I don't have them before us here today. They involve falsification of log records of catch. They involve using gear that was improper in the area. They involve being in an area when they are not supposed to be in the area, and they more seriously involve just overfishing the quotas that might have been established.

Q Now, these violations of treaties and regulations and so forth that you speak of; are these violations that have [17] been discovered of foreign interests, foreign fishing vessels? A Yes. All of them are foreign fishing vessels.

Q Now, the American fishing industry operates on an overnight sort of operation; is that correct? Would you explain that term, if it is accurate? A Yes. I guess it is a comparison to the foreign fishing effort that we are talking about. The American vessels are very small, most of them well under 150 feet, and they go out and come back in 24 or 48 hours. Although they are capable of perhaps staying out a week or 10 days, something like that, it is generally not the practice to do so. It depends a little bit on what species you are going over.

Scallops, for example, where you process them on board, you can stay out a little longer. Most of the fin fishing, which is what we are dealing with in these international

agreements, the American effort on those fisheries, on those stocks, is characterized by in and out daily trips, if you want to call it that, overnight trips, whereas the foreign fishing effort is characterized by very large intense trawl boats and motor ships, factory ships, that stand by and take their catch and they stay in the area months on end. They even—they rotate their crews literally by air, keeping the vessels in the area.

Q You referred to motor ships or manufacturing ships. What is the purpose of those that the foreign interests have? [18] A To take the catch from the slightly smaller catching vessels and be able to process it, and I assume make it more economical for them to fish and maintain a very distant water fishery. Bearing in mind, of course, that the fish we are talking about in these international agreements, again, are in the northwest Atlantic, which is off of the northeast coast of the United States. They are the fish—they are the stocks and fish that have historically supported Canadian and United States fishermen, for example, and, you know, if you are coming from the Soviet Union, or England, or Spain, or anywhere, you have a different logistic problem coming to get these fish than we have to come get them. We being the Americans.

Q Then is it your testimony that generally speaking, American fishing industry, American-based fishing industry does not employ the use of manufacturing ships for offshore manufacturing? A I don't believe that there is a single mother ship, manufacturing ship in the American fishery.

Q Is it fair to say then that the American fishery is dependent upon its own waters and the waters close to the United States for the taking of fish? A In the northwest Atlantic, on the northeast, and East Coast, yes.

Q Prior to the enactment of Section 28.1-81, was there anything to your knowledge in Virginia law which would [19] prevent totally a foreign-owned corporation from establishing a corporate structure in Virginia and fishing in Virginia waters within the three-mile limit? A No, sir, other than the residency requirements. If he could otherwise meet the provisions of law, there was nothing that dealt with foreign ownership.

Q In terms of stock ownership? A Right.

Q Turning your attention now to menhaden fishing in the Chesapeake Bay, you are familiar with the provisions of Section 28.1-60(3)? A I will be in just a moment.

Q Yes. A Nonresidents.

Q What is the general purport of that provision? What does that do in terms of restriction, restricting who can fish in the Bay? A Okay. Generally speaking, that section limits fishing in the Chesapeake Bay, which is delineated by a line drawn from Cape Charles to Cape Henry, really. It limits fishing in the Bay to resident corporations. It does permit nonresident corporations, or nonresidents, let me put it that way, to fish eastward of that line in the Atlantic Ocean, the three-mile limit for a limited period of time. I mean, for a season. I shouldn't say for a limited period of time. For a [20] specific season.

Q Is that a new statutory provision, or one that you have been familiar with since you have taken your position? A Good heavens, no. That has been on there for a long time.

Q Do you have any recollection as to what date of its enactment would be? A No, I don't. But it is a number of years. I looked it up the other day, and forgot.

Q All right, sir. Are the amounts of dollars, money taken in from licensing activities by your Commission sufficient to support the activities of the Virginia Marine Resources Commission? A Oh, heavens, no.

Q Is the Commission active in the management and conservation of fishery resources in Virginia? A We certainly think so.

Q And what agency do you rely upon for technical and scientific advice regarding fisheries conservation? A Virginia Institute of Marine Science.

Q Are any of the license fees collected by your Commission directed towards support of the activities of the Virginia Institute of Marine Science? A Well, not directly. The license, fishing licenses are a general fund revenue to the extent that they go into the [21] total treasury of the state and are reappropriated. But they represent a very minor amount of money alongside of other revenues.

Q But your agency, the Marine Resources Commission, does receive general appropriations from the General Assembly and is not self-supported by licenses? A Right. And those general appropriations far exceed what license revenues we generate in this state.

Q Is it your position as Commissioner of Marine Resources, or what position would you take as Commissioner of Marine Resources regarding the possibility of foreign fishing interests becoming active in Virginia waters? A Well, okay. You are asking me for my personal feeling regarding that?

Q In your capacity as Commissioner? A Right. I would say that having served on the various international groups that you have previously identified, having seen

those statistics and having discussed these matters with people at the State Department, Department of Commerce, that indeed there is a difference in fishing philosophy of the foreign nationals that are now fishing off our Coast. We have referred—we have previously referred to those fisheries being in our waters, and they are the stocks on which the American fisherman has historically relied and had his livelihood. Incidentally, we believe has had—that makes the American [22] fishermen have a kind of vested interest in the conservation and preservation of those stocks. We haven't seen that same kind of philosophy on the part of the foreign nations. It varies from nation to nation. There is no question about that. But as a whole, we haven't seen that.

I would not want, certainly would not want to see that kind of philosophy come into and be a part of Virginia fisheries, fisheries on which the Virginia fisherman has historically relied, and of great importance is what we would call our internal waters, mainly the Chesapeake Bay, which is a very unique resource.

Q Is it your view that the purpose of enacting Section 28.1-81(1) was to preclude foreign interests from entering Virginia waters and using the resource? A Well, it certainly precludes them from—yes, from using the loophole of the corporate shield of coming in and using these fisheries. Again, I can't say as to why the General Assembly passed it. I think this is certainly one cogent argument, and one I would certainly use if it were up to me.

Mr. Moore: That is all I have.

Cross-Examination

By Mr. Willcox:

Q Mr. Douglas, you did not propose that bill; did you? [23] A No, sir.

Q What is your personal professional background? A Prior to coming here?

Q Yes. I mean, are you a marine biologist, economist, or what? A I am closest to an economist, I guess you would say, a businessman.

Q How long have you had this job? A It will be five years in July, next July. What is that, four and a half years?

Q And so that in terms of the scientific end of fish resource management, that is not your personal field of expertise? A It is now. It wasn't when I came here.

Q All right, sir. Now, the four fish that you spoke about that you had statistics on are largely caught beyond the 12-mile limit; aren't they? A I would say so, yes, sir. But that again, if you would like, we can get you a breakdown on that.

Q I am satisfied with it if you agree with me generally. Certainly not within the three-mile limit? A Some are, but principally, no. Principally, no.

Q Isn't it true there is really very little commercial fishing for anything except menhaden within the three-mile limit? A Oh, no, sir. One species is an anadromous species [24] that we mentioned, and that would be river herring, and river herring has been a substantial fishery in the Chesapeake Bay which has declined to practically, in the last—well, they are beginning to revive, but the last five years has been zero.

Q If you attribute that decline to the foreign fisheries operated in U.S. waters, you are attributing it to the activities of the foreign fishermen beyond the 12-mile limit? A That is correct.

Q Can you explain to me what in the new statute would in any way improve that situation if the bad result is attributable to activities beyond the 12-mile limit? A Well, I think the answer there is that the Virginia statute obviously doesn't apply beyond the three-mile limit. No question about that.

Q So nothing in the Virginia statute can change what is now being done beyond the 12-mile limit? A That is correct.

Q And if the activities beyond the 12-mile limit are what are causing you trouble, this statute isn't going to help you? A Not to reverse what is occurring, as you have correctly said, beyond the 12-mile limit, and affecting our landings.

Q And United States law prevents foreign nationals from fishing within the 12-mile limit at this time? [25] A Basically, yes.

Q And you are engaged with others in your field in an effort to extend the United States limit from 12 to 200? A Yes. We are on record as being in favor of that.

Q And if you are successful, then foreign vessels will be kept beyond the 200-mile limit? A No, sir, not necessarily.

Q They would be controlled within the 200-mile limit? A Yes, sir.

Q Are these four fish migratory fish? A The four that I mentioned?

Q Yes. A I would say yes, but your next witness is more capable of answering that question than I am as to the biologic nature of those four fish.

Q Assuming for the sake of argument that Virginia had the power to regulate fisheries for 200 miles offshore, could you affect significantly fish stocks by unilateral action of the State of Virginia which was not matched by states on either side? A I don't know how to answer that. You could, and yet, obviously, it wouldn't be as effective as if you had collateral-type regulations by other states.

Q You will concede that to work the seaboard, you have to work it all together? A I would concede that would be the most desirable [26] if you wanted to regulate certain stocks, or the biomass, yes.

Q There would be very little means of keeping fish within the prolongation of the northern line of Virginia and the southern line of Virginia, and keep them out of areas north and south of that; would there not? A Wait a minute. I don't follow that one.

Q You couldn't build a fence? A Oh, no.

Q Constituting the northern boundary of Virginia water and the southern boundary of Virginia water, and keep fish within it? A No. I think the only thing you could do, and I am sure you know this, would be to somehow regulate, if the states were even given the authority to regulate in this hopeful new area, would be to limit the effort somehow in the waters that might control us, and I guess your point is that if Maryland doesn't limit it, then have we accomplished anything by limiting it in Virginia. My answer is, yes, we have accomplished something, but, obviously, it would be better if all states, or if there were a uniform action throughout the range of that species. I don't think there is any question about that.

Q Would you also agree with me your attempts to keep foreign vessels out of Virginia's three-mile limits have no

practical effect, because there aren't any foreign vessels in there, and cannot be under current United States law? [27] A Well, I don't think you prefaced that with a correct statement. By the definition of the new law, there were vessels fishing that would be precluded, which we have stated were namely the vessels, menhaden vessels of Seacoast.

Q And Seacoast Properties is a— A But, obviously, the Virginia law does not deal with the foreign national vessels which are now beyond the 12 miles. And as I understand that law, all we would be dealing with would be the ability of any foreign interest coming in, and I think they would have to purchase Virginia, or not Virginia, but U.S. vessels, because even the Soviets can't enroll their trawler in the U.S. fishery at this time. So it would be an investment in vessels that were already enrolled in the United States fishery.

Q Mr. Douglas, in your official capacity as official spokesman for Virginia, and an expert in your field, are you testifying that you believe this new statute will have any beneficial effect on the fisheries in Virginia or the United States? A Well, first of all, it wasn't designed to. I can't believe it was designed to attack the United States problem. I think you and I both would concede that.

Q It was designed by counsel for Zapata-Haynie Corporation; was it not? A That I cannot testify.

[28] Q Wasn't Mr. Dunton in here five minutes ago reviewing it with you, just before you testified? A Mr. Dunton has reviewed it with me on several occasions.

Q Isn't he general counsel for Zapata-Haynie? A I don't know whether he is general counsel, but he does represent—

Q It is through his efforts this bill was presented to the Assembly; was it not? A Senator Mann presented the bill. Mr. Dunton was there testifying on behalf of it.

Q Well, answer me if you know. Was it not Mr. Dunton who got Senator Mann to introduce the bill? If you don't know, say so. A I would say I believe he did, but I can't testify to that.

Q And the net effect of the bill is, so far to date, the only result of it has been to keep Seacoast from fishing off the shores of Virginia? A To the best of my knowledge, that is the only firm that has been affected at this time.

Q So it has not been a problem with foreign interests trying to acquire U.S. corporations so they can fish within your three-mile limit? A No, sir. This is the only instance I know of.

[29] Q And the three-mile limit, sir, what gives you the right to patrol the first three miles of your coastline? What law, if you know? A I don't know. I can't cite you the law. It is my understanding that this right was given to the states by the Federal Government, and that it is not uniform, that Texas or some other state has a territorial sea of slightly more than this.

Q And is it not true if a foreign interest purchased a United States corporation, that before those U.S. registered vessels could be registered, or continue in service, they would have to obtain the approval of the United States Department of Commerce? A I believe that is correct. I am not familiar with that process to that degree, but I believe that is correct.

Q Did you join with the representatives of Zapata-Haynie in opposing the relicensing of these vessels in Seacoast Properties after it was acquired by the United Kingdom interest? A The re-enrolling of those vessels and documentation of those vessels in United States fisheries? Did we inject ourselves into that decision? We did not.

Q But you know in fact that did occur. There was a hearing, and they were relicensed, or redocumented by the permission of the United States Department of Commerce. A I know. Yes, I know they are documented. I do not know about a hearing, or who was there, or what was said. We [30] just don't know that.

Q Assuming for the sake of discussion that the United States law would require that vessels carrying the United States documentation, whose corporate ownership changed to foreign nationals, would have to get them redocumented after a hearing, would that not give you adequate opportunity to complain if you felt that that particular Virginia, or United States corporation was thereafter going to change its fishing practices to your detriment? A That certainly provides an opportunity. Whether or not it would be an adequate opportunity, that is objective. I guess I would testify that I don't find many adequate opportunities in the Federal scheme of things, under any circumstances.

It is my understanding, and quite honestly, Mr. Willcox, my knowledge of this comes from listening to testimony on a Federal bill approaching the same problem when certain fishing interests were complaining about this very process. However, the Federal Government may or may not hold a hearing on the matter.

Q All right. A So whether you consider that adequate, I don't know. I don't really—not having ever tried to involve myself in that, I just don't know what we would run into.

Q Can you tell me why a bill was passed, or did you [31] support in the Virginia Assembly this bill to be passed as emergency legislation? A We supported the bill. I don't recall that there was any testimony or any question of me as to why it may, or why it did carry an emergency clause.

Q Were you then aware of any effort by any foreign interests to acquire any domestic corporation which would have fished in your waters but for this bill? A At that time, the time the bill was proposed, I don't believe there was any foreign interests trying to acquire an interest in vessels that might fish in Virginia waters. The Seacoast Products people, or Smith Meal people, had sold out to what we understood was a British interest. And again, like I said, we indicated to the Senate that this company would undoubtedly be affected if our information was correct.

Q And that had occurred several years prior? A I think so, but I don't know what the date of this was.

Q And you issued nonresident licenses for their vessels for a number of years before the 1975 legislation? A We issued them one year, I know, and one year when they asked for them, there was a problem of the vessels being deemed to be, I think, New Jersey vessels, and the licensing fee was therefore very steep. I don't believe any vessels were ever licensed. But, yes, vessels from that company under its current—[32] I really don't know what their current ownership is. I only assume under their current ownership they have been licensed by the Commonwealth, yes, prior to the passing of this act.

Q The menhaden fishing season is from early May to when, late August? A It goes up into December.

Q It begins in early May? A It begins, oh, what is it, the first of May, first Monday in May.

Q Something like that? A Yes. Unless you want it direct, but it goes to December.

Q Since you are knowledgeable in Virginia practices, a law passed by the General Assembly of Virginia normally becomes law as of July 1; does it not? A Or June 1, if it is in the short session.

Q All right. A I will concede it not being emergency legislation it is conceivable that vessels from the only company affected could have been licensed for that forthcoming season prior to the effective date of the act.

Q Can you think of any other reason it was made emergency legislation but to bar that particular company from obtaining a menhaden license for the coming year? A I can't testify for the reason of emergency [33] legislation per se. As you mentioned, it wasn't my bill.

Q Can you think of any other reason, any other factor that would have had anything to do with it but that? A Let me just say this, Mr. Willcox. You press me on this issue, but whatever merits anyone may have thought that bill had, there may also be reasons for imposing those merits at an earlier date. Okay. So I just cannot really answer that.

Q But you are not aware of any situation anywhere that was affected by the bill, or has been affected by the bill but the one menhaden fisherman, Seacoast Products Corporation? A Well, again, you are attempting to trap me on an item.

Q I am not attempting to trap you. Have you turned down any license for anybody except Seacoast Products?

A No, sir. No. I just don't know, you know, what the effect was other than it is obvious when you put emergency legislation in, it becomes effective upon signature, versus June 1, and it is true that the opening date of the season fell before June 1. And if you want to draw your conclusions from that, I can draw the same conclusions you can. But I didn't put that bill in. I didn't put that emergency clause on it, and I don't recall that we were asked a single question concerning the emergency clause. You know, we just never addressed it.

Q In your various participations in various professional organizations seeking to extend the 12-mile limit, [34] has there been any consideration that doing that would do no good, because all these foreign interests can sneak in and buy existing U.S. companies and evade the law? A Yes. That has been posed to certain Congressmen and Senators as being a possible loophole, and I believe there was, and perhaps still is, a bill in Congress to address that very point.

Q On a national basis? A Yes, on a national basis.

Q Were you Commissioner when the Haynie Corporation was taken over by Zapata? A When it was taken over by Zapata?

Q I don't know. I was going to ask you. A I don't know. I became Commissioner in what, July 1, 1971?

Q Let me go the other way, sir. I read in the paper the other day Zapata-Haynie is a California corporation engaged primarily in tuna fishing on the West Coast, and some menhaden fishing on the East Coast. Did you read that article? A No, but I am familiar with Zapata West Coast fishing interests.

Q Are you sure that Zapata-Haynie Corporation is a Virginia corporation? A They have given me affidavits to

my satisfaction that they are, that they meet the requirements of law in that [35] regard.

Q All right. A As did Seacoast when we issued them a license.

Q If Haynie, when it merged with Zapata, had become a Delaware corporation or some other corporation, it would have been prevented from fishing within Chesapeake Bay; would it not, by 28.1-60? A You force me to read this now. Let me just say they have to satisfy the requirements of 28.1-60, as well as 61, which deals with application for resident.

Q Doesn't that limit fishing within Chesapeake Bay to corporations which are Virginia corporations?

Mr. Moore: I think the wording of the statute is resident, and the question is how it is applied.

The Deponent: You know you are talking about corporations—

Mr. Willcox: This is off-the-record.

(Off-the-record discussion.)

Mr. Willcox: Back on-the-record.

By Mr. Willcox:

Q Mr. Douglas, you have just, at my request, perused the statute which prohibits fishing with the Bay to corporations other than domestic corporations. A I think that is correct, yes.

Q You have said earlier that you were concerned [36] about the predatory fishing habits of foreign fleets beyond the 12-mile limit, because of their effect upon fish stocks. A Yes.

Q Can you tell me on what basis you, or what is your basis for denying American fishermen who are not residents of Virginia the right to fish in Chesapeake Bay, and limiting that to Virginians only? A My basis is because that statute tells me so.

Q But it has nothing to do with the fishing practices; does it? A Of the nonresident fishermen?

Q Yes. A I don't know. I really don't know why.

Mr. Moore: I think you are getting into something he can't testify to, the rationale of something passed in 1938.

A (Continuing) We might suppose, but I don't know that I can answer that at all, in all fairness, Mr. Willcox.

By Mr. Willcox:

Q Do you impose, by law, any catch limitations on menhaden fishermen within the bay? A In terms of the total amount, or daily catch, or tonnage, or something of that nature, no, sir.

Q So in terms of managing the stock of menhaden fish within the Bay, you have no regulations which would differ as to [37] whether they were resident or nonresident fishermen? A Well, what regulations we do have that would constitute a management program, and there are some regulations, only apply to residents simply because under current statute residents only are allowed in here.

Q But you do not presently have any catch limitations on menhaden within the Bay? A Not per se. Now, I don't want to leave you with the mistaken impression there are no impositions of a management nature on menhaden fishermen. There are, such as mesh size in the net. So, you know, this may be—we hope this is a limiting factor as a conservation nature.

There are prohibited areas in the Bay. Namely, without going into the basic tributaries and smaller creeks—in other words, it is limited to the Bay proper, so to speak.

Q Those same limitations could be made applicable to any boat law, any fishing within the Bay? A Oh, yes. I have seen nothing about those that, you know, would imply that they could only be applied to resident, or a one-armed person versus a two-armed person, or anything.

Q A North Carolina boat using the same regulations would have no more effect upon the fish than a Virginia boat using the same regulations? A Other than that is an extra boat in the Bay, yes.

Q Do you limit the number of Virginia boats in the [38] Bay? A No, sir.

Mr. Willcox: I have no further questions.

Mr. Moore: I have a couple more.

Redirect Examination

By Mr. Moore:

Q Mr. Douglas, did you say previously that general appropriation tax dollars which go to your agency, the Marine Resources Commission, are used in management and conservation programs of fisheries in the Bay? Maybe I need to rephrase it. A You lost me by one point there, if you will.

Q Is it fair to say that the general appropriations of the Legislature to this agency are used in part for management and conservation of the fisheries resources in the Chesapeake Bay? A Yes. The general funds appropriation—all general fund appropriations that come here, we think, can be shown

to be part of an integrated fisheries management plan in all of Virginia's waters. Obviously, the Chesapeake Bay, you know, constitutes the majority of it. No question about that.

Q All right, sir. And, of course, who pays for this ultimately? Where do those general appropriations come from that the Legislature— A They are general funds, other than one special [39] fund dealing strictly with oysters.

Q In terms of taxes, who pays the taxes that support those funds? A The general taxpayer.

Q Of what state? A Of Virginia.

Q Thank you. With regard to Section 28.1-81(1), this is the alienage bill, you expressed concern with regard to the decreased fish stocks in the offshore waters outside of the 12-mile limit resulting in part, at least, from, in your opinion, predatory practices by foreign fishing interests. Is it a fair statement that the enactment of the state law in question here was in anticipation, and would close a loophole in Virginia law which would have allowed those same foreign fishing interests to enter Virginia waters whenever they pleased?

Mr. Willcox: Let me note an objection to this. In the first place, it is a very leading question, and in the second place, Commissioner Douglas said it wasn't his bill to begin with.

A Yes. Could I—may I address that point? I think that maybe I am trying to anticipate what both counsel are trying to drive at. It seems to me that the distinction that we have to make here is that I personally don't have any great fear, as I think Mr. Willcox is trying to bring out, that suddenly the Russian fishing fleet is going to be in the Chesapeake Bay. [40] That, obviously, isn't going to happen, because—or we hope it isn't going to happen—because of

the very things he pointed out, that even when you buy—first of all, you have got to already have your vessels enrolled in the United States fisheries. It is my understanding that the Russians are not going to be allowed to enroll their vessels in U.S. fishery and come inshore with them.

There is the ability to buy U.S. vessels already enrolled in the fishery, such as several firms have already done. Mr. Willcox points out there is a procedure whereby they have to be approved somewhere at the Federal level. I think the problem that I personally would see is not vessels, but more of a philosophy and disregard for both law enforcement, which I am charged to enforce, and you must get some voluntary compliance in this game if you are going to effectively enforce your regulations. You have to have people out there who are not totally disregarding what you are trying to do, and if they have a vested interest, if it is stock on which they have historically fished, they tend to have that interest, as opposed to the Soviets, or Poles, or foreign efforts that we have been talking about.

So it seems to me that the problem that I would see, and that this bill, and new law would prevent, is it would prevent this kind of philosophy from coming into waters that have historically been managed by Virginians for Virginians, and [41] have supported Virginians' fishing industry.

You know there has to be a distinction between suddenly an invasion of foreign vessels into Virginia waters. I don't see that.

By Mr. Moore:

Q But is it fair to say you personally know of no law which would have prevented such foreign interests from entering Virginia waters through domestic corporations established here, except this statute itself; is that correct? A Yes. I think I testified to that earlier.

Mr. Moore: That is all.

A (Continuing) Can I go back and say that the question, when you said what was—I don't know what the intent of the Legislature was when they passed it, or know why, what protection they were trying to give us. I am just saying that last statement is a protection that I see that it has given us, or does give us.

Mr. Moore: All right, sir.

Mr. Willcox: Excuse me.

Recross Examination

By Mr. Willcox:

Q As to that last question, that is an incomplete answer; isn't it, because there is a procedure for requiring the consent of the United States Department of Commerce? [42]
A I acknowledged that, yes.

Q Well, I believe in answer to Mr. Moore's last question, you said the only law you knew that would prevent that was the Virginia law. Is it not true, in addition to the Virginia law, they would have to have gotten the consent of the Department of Commerce of the United States? A You may be correct there, because at the time that this law was being enacted, I was unaware of what procedures were at the Federal level for accomplishing this. Now, I must say that I still don't know the details of that. We are not that interested in it. We have not been. I don't know whether that has any limiting factors concerning size of vessels or not. You know, I gather that that Federal procedure deals with the enrollment of a vessel, documentation of a vessel. The Virginia law deals with alienage per se. You know, that is 100 percent stoppage, providing it meets the 25 percent

requirement, or whatever the stockholders. So in all honesty to you, that is correct.

There would appear to be one other avenue of addressing this problem, however effective or ineffective, or adequate is the term used, it may be, which I didn't know about at the time the bill was being passed. I am aware of it now, but I don't know whether that addresses all cases which might conceivably arise where a foreign interest would want to buy vessels documenting the American fishery. I don't know that I [43] am saying—

Q If it did then? A Then there is one avenue that we could probably take. Again, I don't know what their rules and regulations are. I understand they have held hearings on some and summarily granted, or denied others without a hearing.

Q Now, I ask you one last question. You have responded to Mr. Moore by posing a possibility of foreign interests acquiring the existing United States documented vessels, and suddenly depriving Virginia of its fish by sucking up all the fish within the three-mile limit, at its worst. Can you tell me of any situation on the East Coast with which you are familiar where a foreign interest have acquired an existing corporation and have thereupon engaged in depredatory, impulse fishing, or any of the kinds of fishing within the three-mile limit that you think are a real threat?
A No. I personally know of no instance that I can point to where the foreign interest has come in and has done the things that we fear might be done.

Mr. Willcox: Thank you.

Mr. Moore: One further question.

Further Direct Examination

By Mr. Moore:

Q In the event the United States Congress were to [44] extend the 200-mile, extend the United States fishery zone from 12 to 200 miles, would you then anticipate the possibility that foreign interests may look toward other avenues of getting at our resources probably through state involvement of corporations in the state, fishing in Virginia waters.

Mr. Willcox: I have to object to the question as being leading, and object to the question as speculating, and all the rest.

The Deponent: I can't answer that. I can only say this, which goes back to a question that Mr. Willcox asked, or a subject that he opened the door on. That is that I do—I anticipate that any passage of the 200-mile legislation will not, in its very nature, exclude foreign fishing in that 200 miles. I anticipate from all I know from my sitting with the State Department and so forth that there will still be foreign fishing, you know, incurred, but under terms and conditions that the United States would impose. I anticipate that the foreign fishing effort would be, under that 200-mile regime, would be reduced from what it is now without it. Whether or not that imposes any pressures on them to seek other ways, you can suppose as well as I.

Mr. Moore: All right, sir. That is all I have.

The Deponent: Is that a fair enough statement?

Mr. Willcox: Off-the-record.

[45] (Off-the-record discussion.)

(And further this deponent saith not.)

(Signature waived.)

W. JACKSON DAVIS was sworn and deposed on behalf of the defendant, as follows:

Direct Examination

By Mr. Moore:

Q Dr. Davis, where are you employed? A I am employed at Virginia Institute of Marine Science, where I am Assistant Director and head of the Division of Fisheries, Science and Services. In that capacity, I am in charge of the fisheries research and advisory activities in that Institute.

Q You have a doctorate in what field? A My major is in zoology. My minor is in botany.

Q All right, sir. How long have you been with the Institute? A 12 years.

Q How long have you been in charge of the fisheries research project? A The total fisheries program since 1972. Before that, I was head of the Department of Acanthology for about five years, and in that capacity I was head of the—was in charge [46] of the programs relating to fin fish, in contrast to shellfish, crabs, oysters.

Q Are you familiar with the characteristics of life cycle feeding habits, spawning and so forth of menhaden? A Yes, I am.

Q Do menhaden spawn in waters off the Virginia coast? A Yes, sir. They spawn in waters, in ocean waters off the Virginia coast, predominantly in the fall and early winter, from November through January, perhaps February.

Q After the spawning, where do the newborn fish reside, in the offshore waters or—

Mr. Willcox: May we suggest that you not lead him quite so much?

Mr. Moore: Do you want me to restate the question?

Mr. Willcox: Let him describe the menhaden cycle.

Mr. Moore: That will be easy enough.

By Mr. Moore:

Q In Virginia waters, that is? A All right. Spawning, the eggs hatch at sea. The larvae drift shoreward, and sometime in the course of the winter or early spring, enter Chesapeake Bay where they spend their first year, approximately. A little less than a year, actually. The larvae enter the Bay, as I said, in late winter, early spring. They stay in the estuarine waters in the Bay proper, or more likely in the saline portions of the tributaries to the Bay, [47] through that summer, and perhaps into early fall, leaving the Bay. Then in October or November, some proportion of those that nurse in the Bay remain there through the winter. More in the warm winters such as last winter was, for example, than in cold winters. Just what proportion of them are there nobody really knows, to the best of my knowledge.

Q You spoke of a period— A That gets you through the first year. Well, you asked for the menhaden life cycle.

Mr. Willcox: Why don't you keep on going?

A Okay. At the end of the first year then, as they leave Chesapeake Bay, they go to the south. Precisely where these fish winter is not known. But fish tagged as juveniles in Chesapeake Bay, and in waters to the north of Chesapeake Bay, have been captured as one year olds in the spring as far south as Florida, and along the south Atlantic shore.

Tagging also indicates that, and this tagging program has been conducted not by our laboratory, but by the National Marine Fisheries Services, and its predecessor organization, Bureau of Commercial Fisheries. This tagging program indicates that, in the case of Chesapeake Bay, in the neighborhood of two-thirds of those fish that were tagged as zero age group, young year fish, about two-thirds of those return as one year olds the following year. They either return or never left, or in any case, they are still there. They are caught. [48] Two-thirds of those that are caught as one year olds are caught in Chesapeake Bay. So in the spring then, one year old fish return to Chesapeake Bay. They reside in the Bay for the summer. In the fall, the situation is repeated. Some of them, at least, leave the Bay and go to the south to wintering grounds not precisely known. Some may remain in the Bay over the winter.

As two-year olds the following spring, they return. A considerable portion of these fish again return to Chesapeake Bay, and again spend the summer there. Those here are the basis of Chesapeake Bay fishery. At the end of the second year, they leave the Bay and again go south.

And the three-year old fish the following year come up the Coast again, and few, if any, three-year olds enter Chesapeake Bay. At this stage, they enter—they become—well, perhaps you might say more migratory than they were in their first two years of life.

The three-year old fish occur off the, along the ocean beaches off Virginia, predominantly off New Jersey, I guess, and those fish that survive the firing and predation again go south for the winter, apparently, though the whereabouts in the winter is not fully known. And move north again in the following summer, this time going further north, and this pattern is repeated.

Menhaden are known to live approximately 12, though [49] very few make it to that age. Each summer they move

a little further north up the Coast, so that you would find off New York, or Connecticut, Rhode Island, in that area you would find predominantly four- and five- year old fish. In years when there are fish in the Gulf of Maine, they are predominantly five, six or older.

The movement of these fish is more—well, I started to say erratic. It is more erratic at the northern end of the range, in that they seem to be temperature limited, and in some years there are fish in the Gulf of Maine, and some years there aren't. This depends in part, apparently, on water temperatures, and in part on age structure of the population at that point in time.

Q Dr. Davis, you referred to fish zero age, which would be those, I take it, who had recently spawned or hatched or whatever is the proper word? A Recently hatched.

Q And you indicated—what months do those fish spend in the Chesapeake Bay, those recently, or approximately—I realize— A Let's say spawning occurs in November off of Chesapeake Bay. It would probably be December or January, perhaps, by the time fish spawned in November entered Chesapeake Bay. They would then remain in Chesapeake Bay or its tributaries from that time through to October, November or December.

[50] Q That is approximately 10 or 11 months; is that correct? A 10 or 11 months, and some, especially in mild winters, would stay there through the entire winter and through the next year.

Q Was it also your testimony, I believe, that of those newly-born which have spent one winter there, and then leave to go south the following winter, was it your testimony that two-thirds of the one year olds caught in the Bay are tagged as those which have spent the previous summer

there? A Yes. That is approximately right. And again, I reiterate these are not my tagging data. They are developed by NMFS lab in Beaufort.

But of the one—let me think how to put this more clearly.

Juvenile fish, that is zero age group fish tagged in Chesapeake Bay, or of the zero age of the fish tagged in Chesapeake Bay, zero age group, two-thirds of those that are caught, two-thirds of the tags returned will be returned from Chesapeake Bay.

Q All right, sir. What age group menhaden are characteristic of Chesapeake Bay, if there is any age group that is characteristic? A Ages zero, one and two.

Q One and two-year olds and— [51] A The zero's, which are the newly-hatched fish which nurse here, the purse seine catch, or the commercial catch in Chesapeake Bay is approximately 90 percent one's and two's. The proportion of one's and two's make up different from year to year as the strength of year class differs, but the catch consists of about that, something on the order, if I remember correctly, about 6 percent of the catch is zero's, and the remainder—I lost track of where I am in these percentages now, but most of the remainder of that is three-year old fish.

Q So I believe, according to your statistics, that it would be approximately 4 percent of the catches in the Chesapeake Bay would be three and older. Three years old and older? A Yes?

Q And what about the northern areas, for instance Narragansett Bay? What are the characteristics, if any age group of fish, menhaden in that Bay, if you know? A The menhaden spawn in that area also, and in contrast to the

fall spawning in this area, they spawn there in the spring or early summer, I guess. So zero's would occur in Narragansett Bay, but the bulk of the population would be fish of, well, probably four years, zero's, and then four and older. I don't know the percentages, percentage breakdown in that area to the extent that I do in Chesapeake Bay.

Q How would the migratory pattern of three- or [52] four-year old fish in Narragansett Bay compare with migratory patterns of zero, one's and two's in the Chesapeake Bay off Virginia? Would they be similar? Would the level of migration be greater in one place than the other? A I don't know that I would—what do you mean about the level of migration? If they winter—they obviously migrated further if they are all wintering in the same southern ground, they weren't stopping in Chesapeake Bay to get their first.

Q I am not referring to the distances they migrate. I believe, and you correct me if I am wrong, but you indicated that three-year olds and older are, "more migratory." A Well—

Q Didn't you just make that statement? A I don't know. I wasn't listening. I think they are, yes, in that they are more migratory in the sense that they move further north up the Coast, and in the summer they have a longer period of migration. They reach their summering grounds later in the year than do the fish coming into Chesapeake Bay. And they seem to be less stable in their summer home.

These older fish seem to sort of drift on up onto the northeast, up the Coast through the course of the summer. Not the entire population, because they are always menhaden along the Coast. But there seems to be a sort of continual drift of these fish up the Coast through the course of the summer, whereas [53] the immature fish, those in

the various nurseries, such as Chesapeake Bay, seem to be a more stable population. They take up residence for a period of time in that area, and stay there rather than being sort of a drifting population.

Striped bass is a fish that has similar behavior.

Q All right, sir. Are you familiar with the season, the legal season for the taking of menhaden in Virginia? A Generally, yes. I may have lost track of the closing date a little bit. It was changed a year or so ago. The season opens on the—this is the season for taking menhaden with purse seines now. They can be taken with pound nets at other times, anytime, but the season for fishing with purse seines opens on the last Monday in May, and it closes sometime in December. I have forgotten exactly when it is. It is the first, second or third week in December. It was extended two weeks. It seems to me it used to be the first of December, and a couple of sessions ago it was extended two weeks.

Q Does this period of time coincide with the period of time when the fish, the menhaden in the Chesapeake Bay are reasonably resident there and stable as a population? A Approximately so. The fish enter the Bay a little before the opening of the season. Usually there are fish available for, again, depending on how the season is going, how rapidly the weather warms, there are fish available for a month to a few weeks before the season opens, and in some years the [54] southward migration is pretty well completed before the season closes, and in other years, as I indicated, some fish over-winter in Chesapeake Bay.

Q Based on your knowledge of fisheries, is the taking of menhaden, the fishing for them generally done during the time when the fish are in active migration down the

Coast? A Well, menhaden are fished from, on the Atlantic Coast they are fished from sometime in May until around Christmas, or occasionally into January, into a week in January or so. So, yes, in places they are fished, of course, during the migration. They are fished in Chesapeake Bay through the summer when they are not in the course of a migration. They are on their summering ground. The only place that menhaden are not fished, or the time they are not fished is during the winter, from the period of around—well, January, February, March, April.

Q Well, in your review, which is the greater—which status of the fish is involved in the greater amount of fishing activity? Are they fished more in migration, or fished more while they are in these bays, and in fairly stable populations? A Well, the Virginia fishery—

Q In Virginia. That is what I mean. A Okay. The Virginia fishery is based largely on the stable summering population here in Chesapeake Bay.

[55] Q All right. Now, are you familiar with what used to be called the North Carolina coast fall fishery, or winter fishery? A To some extent, yes, sir.

Q What did that involve? What was the—first of all, what was the activity of the fishermen themselves? How was the fishery undertaken? A It is a purse seine fishery.

Q Located where? A As it is elsewhere. It is centered in Beaufort, Morehead City. The boats operate, or did operate out of these ports. The situation is changed somewhat right today because of a number of reasons.

Q Well, is that a fishery which, fishery activity which attempted to catch migrating menhaden? A Yes.

Q When did that take place? It was in the fall; wasn't it, or was it? A That is right. It was called the Carolina fall fishery, yes. It started sometime in late November, or mid to late November, ordinarily, and extended to around Christmas. Ordinarily, they try to stop before Christmas so the men could get home for Christmas.

Q What has been the result in recent years of that fishery? Has it been successful, good, or has the fishing been —[56] A Over the past few years it has not been very good. The catch has declined in comparison with say the '50's, early, very early '60's.

Q Would that in your opinion indicate any decrease in the level or amounts of migration by menhaden down the Coast? A Well, inasmuch as we don't really know where these things winter, it is difficult to answer that question precisely. It certainly could. That is one plausible explanation that the fish in the past few winters have not come as far south, have not migrated to the extent that they did back in the heyday of the Carolina fall fishery.

Q Did you have anything to add to that? I didn't mean to cut you off? A Well, I might conceivably say that another explanation—it doesn't seem to me as logical, is that the migratory pattern changed and they are migrating offshore, or are not showing at the surface in schools like they did formerly. But the last couple of winters have been somewhat mild, and I expect that the fish have just not come this far south.

Q When did the National, if you know, when did the National Marine Fisheries Service begin its tagging studies of menhaden fish? Do you have any idea? A In the mid to mid '60's, or the latter half of the '60's. I don't remember precisely.

Q Are you aware of any tagging studies that might [57] have been done in the '40's, or '50's? A No, no, I am not.

Q All right, sir. Now, is it your opinion that the results of these tagging studies have made some changes in scientists' views as to the nature of menhaden fish and their habits, their migratory patterns and so forth? A Well, yes. Really they have been the basis for describing the migratory pattern. But what has happened, when the tagging program started, the menhaden population was at a very low ebb. I think the first results that were gotten from the tagging program, as the population has, as the menhaden population has recovered, have shown not to be typical, or perhaps typical of the age groups and fishes that were available for tagging at that point in time. And now that we have had a broader spectrum of fish available, I think the data coming in from the tagging programs over the past few years perhaps is a better picture of the general situation, with the reservation that migration seemed to be somewhat temperature related, so that it may not be possible to speak of a typical migration. We may have to say this is the warm winter pattern, and this is a cold winter pattern, for example.

Q Turning your attention again to the comparison between the Chesapeake Bay, and perhaps Narragansett Bay in Rhode Island, you indicated, I believe—well, what age group menhaden fish would you expect to find in and around the Rhode [58] Island waters during the season, the summer season? A During the fishing season?

Q Right. A The zero's that were produced there by the adult spawners. The adult spawners would be mostly four years and older, I would think, at that latitude. So you would have a population of very young, or young of the

year fish, and then very few, if any, one's, two's and a smattering of three's, and then four's and five's.

Q And is it your testimony that three's and four's and five's are more migratory than one's and two's? A More migratory in the sense of traveling further in the summer. They move further to the northeast up the Coast than the one's and two's do. And perhaps more migratory in that the older fish seem to, through the summer, continue to drift onto the northeast, whereas the fish, the one's and two's in Chesapeake Bay, don't continue to move. They enter Chesapeake Bay, and perhaps only because it is a closed system, when they get to the Susquehanna River they can't go anywhere else. They don't continue to drift along. Those that enter Chesapeake Bay seem to stay put through the summer here.

Q Would you expect then a more stable population in the Chesapeake Bay, or in Narragansett Bay during the season? A I am not certain I know precisely what you mean by stable. I guess more stable in Chesapeake Bay, in any one year. [59] Certainly more stable in the other sense of in the long-term history there are more one- and two-year old fish than three's, four's and five's, back in the late '60's, for example, when the menhaden population was at a very low ebb. The fisheries remained in Chesapeake Bay, one- and two-year old fish, whereas there was essentially no fishery on further up the Coast on older fish, apparently because there was so few of them it wasn't economically feasible to fish them.

Mr. Moore: That is all I have.

Cross-Examination

By Mr. Willcox:

Q Perhaps because all the one's and two's were caught in Chesapeake Bay, and nobody grew to be three or four? A Indeed, that was part of the problem.

Q Dr. Davis, menhaden are migratory fish; are they not? A Yes, they are.

Q And migratory implies they move around? A Yes.

Q What is the definition of a migratory fish? A Well, I suppose one which moves from one, from a place, from place to place within its range seasonally for any of a number of purposes. Some fish are migratory for purposes of spawning, as shad and salmon, for example, which spend part [60] of their life at sea. They migrate into fresh water spawning areas, and the adults then either die or return to sea. Others migrate, apparently, in response to temperature changes. And there are, of course, degrees of migration illustrated by various sorts of fish. Tuna, for example, being very highly migratory, moving a few thousand miles in the course of a summer, and other fish moving much less migratory. There are others that migrate into a different degree in different stages of the life cycle. Striped bass, for example, are rather sedentary. They remain in the area in which they spawn until they reach an age of around three or four years, and then they begin a coastline, coastwise migration.

For example, striped bass that spawn right here in the James River, remain in the James River until they are three or four years old, and then they begin a migration up the Coast in the summer, and back down here to spawn in the winter.

And they, like menhaden, move a little further north each summer once they start the migratory phase of their life.

Menhaden are sort of between tuna and striped bass, in that they don't have a sedentary stage totally, or as already indicated, that some menhaden probably do have a sedentary stage. They may remain in Chesapeake Bay. Those that spawn offshore may remain in Chesapeake Bay for nearly two years before they begin migrating, and before they make their first southward trip. They [61] then come back into the Bay the following summer and are sedentary for a while. And then as three-year olds, they become increasingly migratory, or move further north. This is not an unusual pattern in fishes along the Atlantic Coast.

Fluke has, summer flounder has a somewhat migratory pattern.

Q If you were to chart menhaden, you would have a series of ellipses; would you not, along the Atlantic Coast? The older they get, as you mentioned, the four's and five's would have a longer ellipse, or higher ellipse reaching further north as they got older? A Well, diagramatically, yes.

Q And are there menhaden in the sounds and inlets off the coast of North Carolina? A Yes.

Q And are they one's and two's, or what would you find down there in the summertime? A Predominantly one's and two's.

Q The same thing you find in Chesapeake Bay? A Yes. Fewer two's as you go further south.

Q And how about Delaware Bay? What would you find up there? A Delaware Bay is, as the southern estuaries are trending toward one's, the more northern estuaries, Delaware Bay would be trended more toward two's.

[62] Q Is that substantially similar to what is in Chesapeake Bay? A Delaware Bay, I suspect, would

have more one year olds, more two-year olds than, a higher proportion of two-year olds than Chesapeake Bay has.

Q And as the tagging program suggests, if there has been one in Delaware Bay, about two-thirds of the zero's tagged come back to Delaware Bay? A I am not familiar with the fate of those fish that were tagged as juveniles in Delaware Bay, or indeed if they were.

Q Are you familiar with any tagging program other than that in Chesapeake Bay? A I had a conversation with Bob Chapoton two or three weeks ago, in which he indicated that juveniles tagged in Massachusetts or Connecticut, or Rhode Island—I am not certain now which he said, that is zero age fish there, were caught as one year olds as far south as Florida, and some throughout the south Atlantic. So this indicates that the fish that occur, the juveniles produced in the north Atlantic moved to the south in the winter.

Q Can you tell us where the other one-third of the juveniles tagged in Chesapeake Bay showed up, the one-third that doesn't come back and get caught in Chesapeake Bay? A Predominantly in the south Atlantic. Predominantly south of Chesapeake Bay.

[63] Q And do you find other tags in your Chesapeake Bay catches? Well, I guess that is the only question I can ask you. Are they catching fish tagged other than in Chesapeake Bay? A Yes.

Q Do you know where they come from? A I can't give you a precise listing in general from—you might expect one year old fish in Chesapeake Bay that were spawned anywhere to the north of here, and a few to the south.

Q And those that enter Chesapeake Bay as spawn—I

guess that is the right term—are hatched where, if you know? A They are hatched in the Atlantic Ocean off the Virginia Capes, or in the general area of—it is practically impossible to say that precisely, because there is no way of putting a label on a fish some half-inch long and tracing it.

Q About 100 miles from the Capes? A From the current patterns—well, that is a reasonable ball park figure, perhaps. I wouldn't want to literally limit it and say none from further than that get here. The general current pattern indicates that they could come from somewhat further than that, but that is reasonable.

Q And after spawning, do they generally seek coastal waters, be they the Carolina Sound, or Chesapeake Bay, or Delaware Bay? A Yes. The menhaden are estuarine dependent, and the juveniles spend their first year in an estuary somewhere or [64] other.

Q And insofar as you know, would the pattern in other estuaries be largely the same, that is that at the same longitudinal, same weather level that the ones would return for its second year? A Well, of course, there is only one Chesapeake Bay at that latitude, and it occupies it.

Q For instance—excuse me. A The one's do not return to areas north of Chesapeake Bay to any appreciable extent. Some probably go into Delaware Bay. But beyond Delaware Bay there are few one year old fish. The one's seem to come about to this latitude, the latitude of Chesapeake, Delaware. This is about the northern extent of their migration. They occur in the summer from this latitude south.

Q And on the other hand, would the one's then be likely to return to the Beaufort-Southport area? A Yes. One's do occur there.

Q Further south? A Yes.

Mr. Willcox: That is all.

Redirect Examination

By Mr. Moore:

Q Dr. Davis, your last answer included the statement that one year old menhaden don't generally, or aren't expected [65] generally to migrate northward past perhaps Delaware, or Virginia's Chesapeake Bay, or at least Delaware Bay; is that correct? A They become increasingly scarce. Yes, the predominant summering ground of the one year old's is south of Delaware Bay.

Q Then is it fair to say that you would not expect as many one year old tags in Narragansett Bay to be fish which spent their nursery summer in Narragansett Bay? Would there be as high a percentage of one year old's returning to Narragansett Bay as there would be one year old's returning to Chesapeake Bay? A No. No, there would not.

Q You also indicated that migration in terms of numbers—I am talking about migration in terms of numbers of the total fishery that will migrate—not distances that they migrate. You indicated that migration levels were related to temperature conditions. The winter, the coldness of the winter and waters, and so forth. Will you expect more menhaden to winter in the Chesapeake Bay as opposed to Narragansett Bay, or points north, or vice versa? A I would expect more overwintering in Chesapeake Bay than north of here.

Q Is it a fair statement to say that the characteristics, in terms of migrating, migratory habits, [66] volumes of

migration, would be different in Virginia waters, particularly in Chesapeake Bay, from those that may be found in bays and bodies of water north of Virginia? A Well, there it seems to me is what I just said in answer to your previous question. The further north you go, the less overwintering there is. The fewer young fish, fewer one and two-year old fish there will be. This is what I was alluding to in comparing menhaden a few minutes ago, menhaden with striped bass. The striped bass have a sedentary early life history stage. Menhaden have a semisedentary early life history stage in which they, their summering area, where they seem to form a sort of stable population, not moving through, is from approximately Chesapeake Bay south to Georgia.

Mr. Moore: I think that is all I have.

Recross Examination

By Mr. Willcox:

Q Dr. Davis, if you were counting three's and four's, you would find more of them north of here than you would in Chesapeake Bay; right? A Yes, yes. Certainly in the summertime.

Q One might argue if you all didn't catch so many one's and two's in Chesapeake Bay, there would be more three's and four's north of here? A That is indeed the truth.

[67] Q And if there were less one's caught south of here, there might be more two's in Chesapeake Bay? A Yes.

Q Is that correct? A That is indeed true.

Mr. Willcox: We thank you.

(And further this deponent saith not.)

(Signature waived.)

(Whereupon, the depositions were concluded at 4:33 P.M.)

[Jurat omitted in printing]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

* * *

[Title of case omitted in printing]

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**DEPOSITION UPON ORAL EXAMINATION OF
ROBERT B. CHAPOTON
TAKEN ON BEHALF OF THE PLAINTIFFS**

Norfolk, Virginia

October 28, 1975

Appearances:
Willcox, Savage, Lawrence, Dickson & Spindle

By: Thomas H. Willcox, Jr., Esquire
James C. Howell, Esquire
Counsel for the Plaintiffs

James E. Moore, Esquire
Assistant Attorney General
Counsel for the Defendant

* * *

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[2] Deposition upon oral examination of Robert B. Chapoton, taken for de bene esse purposes on behalf of the plaintiffs, before Frances P. Zahn, CSR, a Notary Public for the Commonwealth of Virginia at Large, taken pursuant to stipulation of counsel, commencing at 2:00 P.M. on the 28th day of October, 1975, at the law offices of Willcox, Savage, Lawrence, Dickson & Spindle, 1800 Virginia National Bank Building, Norfolk, Virginia; and this in accordance with the Federal Rules of Civil Procedure.

ROBERT B. CHAPOTON was sworn and deposed on behalf of the plaintiffs, as follows:

Direct Examination

By Mr. Willcox:

Q Please tell us your name, age and present residence? A Robert B. Chapoton; 45; reside at 211 Knox Drive, Morehead City, North Carolina 28557.

Q By whom are you employed and in what capacity? A I'm employed by the National Marine Fisheries Service. I'm the leader of the menhaden assessment task, situated at Beaufort, North Carolina 28516.

Q And how long have you been employed by that organization? A 18 years.

Q Is it funded by the United States? [3] A Yes.

Q And is it the principal menhaden research facility in this country? A Yes.

Q What is your professional education, background? A All right. Attended Michigan State University at East Lansing for approximately six years, have a bachelor of science in fishery biology and a master of science in fishery biology.

Q Do you belong to any professional organizations? A Yes. American Fishery Society, American Institute of Fishery Research Biologists, a number of lesser ones.

Q Have you served as a professional adviser to various Government organizations as respects your specialty of menhaden fisheries? A I have been the spokesman for the national fisheries program, menhaden research, at scientific and technical meetings held by the Government, both relative to meetings with the foreign countries and the U.S. Government with its own domestic industry.

Q Is there an international agreement on menhaden fishing beyond the 12-mile limit? A Yes. There are presently two in force, one with the Soviet Union and one with Poland. They agreed to abstain from fishing northern Atlantic menhaden from January through [4] April annually in an area extending from Virginia to Florida.

Q Does this same agreement prohibit United States vessels from fishing in the same area during the same period? A Yes. This would be outside of the 12-mile limit, okay?

Q Would you describe for us generally the spawning and and migration cycle of the Atlantic menhaden? A Spawning occurs in each month of the year. However, with the onset of migration of the adult fish from southern waters, those waters below Cape Hatteras—comma, comma—the fish will spawn as they migrate up the Coast, commencing in March, and will continue spawning until they reach New England waters in mid summer.

They have thus spawned off Virginia, Chesapeake Bay, Maryland waters in the spring in April or May. Spawning will continue again in New England waters in August and September. Then the fish will migrate southward in the fall and there again they will spawn off Delaware Bay and

Chesapeake Bay in the fall, principally October and November.

Spawning will continue possibly by the same fish off North Carolina in December and January.

We find the newly-hatched eggs and larvae of Atlantic menhaden from the Coast waters out to as far as 110 miles off the coast of South Carolina, North Carolina during the winter.

[5] The Atlantic menhaden female first spawns at reaching age three.

Q Are the vast majority of the Atlantic menhaden spawned in the open ocean? A Yes.

Q A fish spawned—all right. The egg hatched, or whatever it is that occurs, off North Carolina in the wintertime would normally move where? A It would normally move toward the Coast, requiring an average of about a month and a half to two months before it reaches brackish or estuarine waters, inside waters.

If spawning occurred south of Cape Hatteras, that larva, that young fish would likely enter estuaries along the North Carolina to Florida coast.

Q And assume a larva hatching north of Cape Hatteras, what would his pattern be? A Going up the Coast, those that were hatched off the mouth of the Chesapeake Bay, even out as far as 60 miles, would tend to work towards the Chesapeake Bay or Delaware Bay area, and then further north, fish hatching in and along Long Island, New York would eventually inhabit estuaries of Connecticut, Rhode Island, Cape Cod.

Those above Cape Code, above, in the Boston to Maine area, would inhabit estuaries in that locality as near as—as far as we know at this time.

[6] Q What would be the travel pattern of a larva hatched off the Virginia coast or the North Carolina coast north of Hatteras which entered Chesapeake Bay as a larva? Where would he normally spend the next two or three years? A Normally, fish entering—young larvae entering Chesapeake Bay would migrate through the open Bay waters and would ascend one of the many tributaries either in the Chesapeake Bay—either in the Virginia portion of the Bay or in the Maryland. The eastern shore or the western shore.

That fish having entered the Bay or tributary in either the spring or the fall, but principally over one winter, would feed and grow in the tributary until—or through that next summer and until the fall period. Maybe September, October, the fish might leave the tributary, enter the Bay water, and if it is not caught as a young juvenile fish, would do one of two things: It would either overwinter in the Chesapeake Bay; that is, the second winter of its life, and contribute to landings, or reside in the Bay that next year as a one year old fish, or it would possibly move, migrate out of Chesapeake Bay southward in the fall, in October and November; and it would appear in the waters south of Cape Hatteras within a month or two after leaving Chesapeake Bay, principally in November or December.

It might continue southward and enter the landings that next year as far south as Florida in the latitude of Jacksonville, Florida, as a one year old fish.

[7] Q All right. And where would that—first, insofar as you have current knowledge, considerably more fish leave the Bay than overwinter that first year, is that correct? A That's a no answer.

Q You don't know, or the answer is no? A No. It's a no answer.

Q Meaning what? A Let's see.

Q Do more juvenile fish stay over that second winter or leave the Bay for their second winter? A Available information, based on tag returns of marked individual fish, marked as juvenile fish in the estuaries, in the tributaries of Chesapeake Bay, indicate that the—well, let's see now. Indicate that the majority of fish, possibly in the 60 percent range, would enter the landings as one year old fish in the Bay proper, or in the waters immediately adjacent to the Bay mouth.

Evidence to date is nonconfirming relative to the fate of some of these fish, because return tag information reveals that some fish from the same stream will migrate out of the Bay and contribute to landings south of Cape Hatteras, North Carolina in November or December as juvenile fish, and then the next year in June or July, some of these same cohorts will appear in landings in Chesapeake Bay. Therefore, we don't know at this time the precise movement pattern percentage-wise of all the fish [8] that are marked in Chesapeake Bay and return in the Bay.

Does that make sense to you?

Q I'm not sure. Specifically, sir, I understand that you say upwards of 60 percent, or a majority, certainly, of the one year old fish which were tagged as juveniles are caught in Chesapeake Bay in their first year, or after their first year. A Yes.

Q My question is do you know whether that 60 percent spent the preceding winter before they were caught in the Bay or outside the Bay? A No. We do not have direct evidence as to that point.

Q But you do know that more than half, better than 60 percent of those which were tagged as juveniles and which

were recovered, more than 60 percent were recovered in their first year in Chesapeake Bay? A Yes.

Q Does that percentage decrease as the fish grows older? A Yes.

Q Are more fish found further north as the fish—more fish originally tagged in Chesapeake Bay, say, as juveniles in their first year, the majority are recaught in Chesapeake Bay. In their second year, the same, I would understand. A It depends on the year.

[9] In recent years, the majority of the caught fish have been of age two. In certain years—or in some years—we get a higher percentage of the tagged fish marked as juveniles back the second year than we do the first year.

It has to do with the behavior and distributional pattern of the total population along the Coast.

Q I think your last answer had to do with the number of fish, not where they were caught. The two-year old fish tagged as juveniles in Chesapeake Bay, are the majority of the two-year old tagged returns returned from Chesapeake Bay? A Can you restate that, please?

Q Okay. I'll try. Do you find many three-year-old fish in Chesapeake Bay? A No, sir.

Q All right. So a fish tagged as a juvenile in Chesapeake Bay by his third year is largely living north of Chesapeake Bay, is he not? A Yes, sir. Except possibly in the fall, where, contrary to a summer fishery, where we would normally expect it to be south of here, having taken place in the fall migration southward.

Q But in any event, there are very few three-year-olds within Chesapeake Bay. They are either in the ocean north of here or in the ocean south of here? A That's right.

[10] Q And even fewer four-year olds in Chesapeake Bay? A That's correct.

Q Now, how about the two-year olds? Are there less two-year-old tagged fish, less percentage-wise, found in Chesapeake Bay than one year olds, speaking of those which were tagged initially in Chesapeake Bay and are caught in their second year somewhere? A The answer is no. Some years we find more two-year olds with tags in them in Chesapeake Bay than we found as one year old fish.

Q Are you referring now to total fish or percentage of the tags? A Both. Some years, the age one fish, marked and unmarked, do not enter the fishery in proportion to their true abundance in the population.

Sometimes their true abundance is not indicated until they enter the fishery as two-year old fish.

Q In terms of the numbers of fish spawned, which are in Chesapeake Bay, during their first year—I don't mean as one year olds. Not during their preone period. A Right.

Q Okay. Are the vast majority of those fish initially outside of Chesapeake Bay? A Yes.

Q Something like 95 percent? [11] A Our best estimate is that it would approach that area of 95 percent, yes. 92, 95 percent.

Q So that regardless of whether or not they spend their first winter or their second winter in Chesapeake Bay, they originated outside the Bay in the ocean somewhere? A The great majority, yes, sir.

Q And since the mothers are all three-year olds or better, very few of the mothers are found within Chespeake Bay? A In general terms, yes, sir.

Q So that the repopulation of Chesapeake Bay itself is dependent upon three-year old or older fish laying eggs in the ocean somewhere? A Yes, sir.

Q As opposed to within Chesapeake Bay? A Yes, sir.

Q Are you familiar with the Atlantic and Gulf Coast menhaden fisheries? A Yes, sir.

Q Is menhaden fisheries a significant portion of the American fishing industry? A Yes. It contributes annually about 45 percent of the total commercial catch of all U.S. fishermen, fresh water and marine species combined.

Q Is it the largest single fishery in terms of a single category of fish? [12] A Yes, it is.

Q Are there certain localities, towns or counties or states which regulate the type of equipment used in menhaden fisheries, which can be used. A Would you restate the question, please?

Q Well, do you know of any municipalities, state or local, which limit the quantity of fish that may be caught? A No, sir.

Q Are there some, however, which say that you can or cannot use purse seines or can or cannot use a certain size opening in the net, or are there certain regulations of that nature? A There are to my knowledge.

Q And are they applicable to whoever is doing the fishing, so far as you know? A Oh, yes. Yes.

Q Do you know of any location other than the Chesapeake Bay of Virginia where out-of-state fishermen are prohibited from fishing for menhaden by state law? A No, but that's probably out of my range of expert knowledge.

Q But you know of none? A I know of none.

Q You are aware that Virginia law prohibits nonresidents from fishing within Chesapeake Bay for menhaden? [13] A I have been told that that is true, yes.

Mr. Willcox: Answer Mr. Moore.

Cross-Examination

By Mr. Moore:

Q Dr. Chapoton, you said that—I believe—you correct me if I am wrong—that the majority of the juvenile menhaden which will be found in Chesapeake Bay during the summer months were spawned in offshore waters adjacent to Virginia's East Coast, is that correct? A Yes, sir. That's the great majority.

Q Great majority? A Yes.

Q Now, after they are spawned and move into Chesapeake Bay, if they were—how long a period do they spend there which would be called their nursery period? A It would be through their first summer of life up until—

Q So the ones in the fall, spawned and brought in in the fall, would remain approximately 10 months, maybe 11 months? A That's right.

Q Those that are spawned in—did you say some spawned in the spring in the Bay also? A Yes.

Q Those would spend maybe six or seven months; is [14] that correct? A Yes. That's correct.

Q All right. After that first nursery summer, you indicated, I believe that a portion would leave the Bay and migrate; and I believe you said southward; and that a

portion would winter in the Bay, remaining there; is that correct? A That's correct.

Q Is there any question that a portion of those nursery juveniles do winter over one full winter in the Bay and then another summer? A We have indirect evidence that they—to answer the question—we have tags from the marked fish only during the commercial purse seining season. The appearance of tags in the landings from the purse seine fishery, the summer after we've marked the fish in the estuaries as juveniles, would be enough evidence that they have not left, say, the Chesapeake Bay during the preceding winter, or absent fishing. So it's indirect as to their exact location during the nonfishing season.

We do have other reports, however, relative to the appearance and presence of the properly sized fish in the Bay during the wintertime which leads us to believe that the fish do in fact overwinter in the Bay.

Q I see. All right. Thank you.

Is migration by menhaden in any way related to temperature of the water and the air, their environs? [15] A It may be. We have no direct evidence or experiments to prove it either way.

Q I see. Do you have any evidence or studies which lead to any conclusions regarding whether or not temperature relates to the migrations? A Temperature probably is a measure, a causal agent; but there is insufficient evidence to show that temperature is the only agent.

Migration, or movement, of the Atlantic menhaden fish, as evidenced from tagging and subsequent recapture at some distant point, is coincidental, however, oftentimes with a change in the water temperature.

Q All right. Thank you.

Is it fair to say—now, I'm not trying to put words into your mouth. You correct me if I am wrong.

Is it fair to say that temperature would be one factor at least which you suspect bears upon the need to migrate? The colder temperature would indicate a need to migrate for the fish in the winter; is that accurate? A I would agree with that.

Q One of other factors. All right.

Would you expect—you've indicated that some fish winter in Chesapeake Bay. Would you expect, based upon your studies and experience, that more fish would migrate in—excuse me—would winter in Chesapeake Bay as opposed to a bay north of [16] the Chesapeake area, perhaps Delaware Bay or Narragansett Bay, talking about wintering populations? A Available information indicates that the bay—the Atlantic menhaden in the bays to the north of Chesapeake Bay, including, say Delaware Bay, Narragansett Bay, Long Island Sound, and waters north of Cape Cod, Massachusetts would have proportionately fewer absolute and percentage-wise numbers of menhaden during the overwinter period, during the wintertime.

Q All right. Are you familiar with what has been termed the North Carolina winter or fall menhaden fishery? A Yes, sir, I am.

Q Can you explain what that term or phrase was used to indicate in the industry? A Ten or more years ago, the Atlantic menhaden population would appear off the waters below Cape Hatteras and immediately adjacent to the Beaufort-Morehead City-Cape Lookout area in November and December.

In the 1950's, the catch from this area would approximate—approximate one-third of the total Atlantic catch that year.

The catch was based mostly on those fish that were two, three, four, five and six year olds; and it was generally agreed by the members of the fishing industry, vessel captains and other knowledgeable persons that the fish had arrived there from more northern waters, including Chesapeake Bay, in the fall.

[17] Q All right, sir. Has that—have you completed your answer? A Go ahead with your next question.

Q All right. Are you aware of the success of the industry in capturing fish in that manner in the North Carolina coastal areas during the fall migration in recent years? Has it been a successful fishery? A The North Carolina fall fishery in recent years has decreased. Catch has decreased in recent years to a level which is one-tenth or less than in former years.

The catch in 1974 was the lowest on recorded history, dating back to at least 1935.

There was a slight improvement in the 1975 catch wherein about 16,000 metric tons were landed.

The catch was mostly of juvenile fish.

Q Has this phenomenon caused scientists of your type to change their views or question prior assumptions and views regarding the levels in terms of numbers of fish that migrate south during the winter? A Yes. For the most part.

In the last 10 years, roughly speaking, there appears to be less of a definite movement or exodus from the northern waters, including Chesapeake Bay, to the waters adjacent to North Carolina into the area formerly supporting the fall fishery.

[18] Q I recognize that the seasons for the fishery vary from year to year. I mean, from state to state. And I recog-

nize you're not expected to know the exact seasons, but assuming for purposes of this discussion—and I think this is accurate—that the fishing season for menhaden in Virginia runs from the months—from the time period, late May through early December; would it be fair to say that the fishing for menhaden in Virginia waters would be an activity in—let me rephrase the question.

If you are fishing for menhaden in Virginia waters during the season from May through December, would you be capturing a body of fish that are in migration, or would they be fish that are in a rather sedentary, stable population? which, if either? A Okay. Sort of neither. It depends on the seasons within that season.

In the spring, meaning April or May, when fishing commences, it would be both on fish that had apparently overwintered in Chesapeake Bay, as well as on fish that had arrived from more southern waters in the spring.

During June, July, August, September, you would be principally fishing on fish of local origin in the general term.

In the fall, October and November, you would again begin fishing in part at least on fish that had arrived here from more northern waters on their movement south, and this would continue on into December when the season closes.

[19] Q Would you indicate that in the latter summer and early fall months, you might be fishing on fish arriving from northern waters migrating south? Would this be true of the taking of menhaden in Chesapeake Bay during those months, as opposed to coastal waters in the three-mile limit? A Oh.

Q My idea is— A Maybe I missed it.

Was your question before rather in Chesapeake Bay or Virginia waters?

Q I should have said the Bay. A Okay. My answer pertained to the Bay.

Q All right. A As well as to the coastal Virginia waters extending out 12 miles.

Q Let me see if I can pursue that last question.

Your answer seemed to be related to the origin of the fish that would be caught during the season in Virginia. I'm concerned about whether or not the activity of taking the fish would necessitate navigating up and down the coast between states in order to take the fish, or is it fair to say that fishing activity is generally pursued through a rather stable operation of fishing in one state's waters for the fish, if they are there, as opposed to following them in migratory patterns up and down the coast? [20] A Oh, yes. Most of the vessels that catch fall menhaden have a restricted or limited range of fishing. The great majority, 95 percent, perhaps, of the fish landed in Chesapeake Bay reduction plants, or plants located in Virginia on Chesapeake Bay, would be receiving catches from Virginia—fish caught in Virginia waters.

Q All right, sir. A Either along the outer Virginia Capes or from Chesapeake Bay proper. Okay?

Mr. Moore: I think that's all I have.

The Deponent: Sorry about that.

Redirect Examination

By Mr. Willcox:

Q Mr. Chapoton, the nature of the industry is such that the companies, the major companies, anyway, have plants in a number of areas; isn't it? A Yes, sir.

Q And the boats tend to operate from a given plant; is that correct? A That's correct.

Q And this is true whether it's boats operating out of plants in the Beaufort plants or boats operating out of plants in the Fort Monmouth area or boats operating out of plants in the Reedville area; is that corect? [21] A That's essentially corect.

Q And when there were lots of fish in the Atlantic fishery off of—the Atlantic fall fishery off of Beaufort, were there Virginia boats down there catching them? A Yes, sir. But they were operating out of North Carolina plants at that time.

Q And were there boats owned by the Zapata-Haynie Corporation as well as Seacoast Products, to your knowledge, operating in the Atlantic fishery, fall fishery, while there were fish there? A Yes. Or their successor—preceding company.

Q Okay. And they would tend—the boats which might have fished in Chesapeake Bay operating out of Reedville moved with the fish to Beaufort and operated out of Beaufort-oriented plants owned by their respective companies? A That's correct.

Q And when the fish disappeared from the fall Atlantic fishery off of Beaufort or Southport, do you know where they went in terms of congregating in some other area, or what? A Direct evidence is lagging. However, surveys for eggs and larvae of the menhaden fisheries in the south Atlantic area; that is, from Cape Hatteras, North Carolina to northern Florida, indicate that the fish were as far offshore as 110 miles, but that they were not at the surface, and no visible signs were made.

[22] Q And our vessels, as well as those of other countries, were prevented from fishing for them by the agree-

ment that you mentioned earlier? A Yes, sir. Since about 1972.

Q Now, when the fish became scarce in the Atlantic fall fishery area, was any change made in the Virginia fishing season? A Yes. It's my understanding that about 1970 or '72, a law was changed in Virginia relative to the closing time in November or the first of December.

Q Was the result of that change to extend the fishing season in Virginia further into the winter? A According to my understanding, yes, sir.

Q So that at about the same time there were fewer fish off North Carolina, then Virginians were permitted to fish longer for them in Virginia waters? A Yes, sir.

Q And are a significant number of the total fish caught in the Atlantic menhaden fisheries caught within Chesapeake Bay? A Yes, sir.

Q Would you estimate how many of the total menhaden catch comes from Chesapeake Bay? A In recent years, it has changed from about 50 to about 69 percent on an annual basis.

[23] Q And do you keep statistics on menhaden fish landings? A Yes, we do.

Q Are you prevented by law from disclosing that information where there are less than two fishing companies in a given area? Or less than three; excuse me. A Yes, sir, I am, by regulation.

Q And are you prevented by that law from disclosing the details of the menhaden fish landings in the Chesapeake area of Virginia? A Yes, sir.

Q So there are then less than three menhaden fishermen in the Chesapeake Bay area? A There are now, yes, sir.

Q And the only two that are there are Zapata-Haynie and Seacoast—excuse me—Standard Products? A Yes, sir.

Q At this time? A At this time.

Mr. Willcox: Off-the-record for a minute.

(Off-the-record discussion.)

By Mr. Willcox:

Q Referring to your data for fish which were taken in 1971, can you tell us where the fish—well, first, what is the north Atlantic area geographically? [24] A For this purpose, the north Atlantic is tributaries in the States of Connecticut, Rhode Island and Massachusetts.

Q And what area is enclosed by what you term the mid Atlantic? A Mid Atlantic is New Jersey, lower New York and Delaware.

Chesapeake Bay is the Virginia and Maryland portion of Chesapeake Bay.

The south Atlantic is North Carolina to Florida, including South Carolina and Georgia.

Q Now, of the fish tagged in 1971 as juveniles in the north Atlantic area, what percentages ultimately turned up in which areas? A Within the next three years, we've received—10 percent of the tagged fish returned were returned from the mid Atlantic area; 85 percent of the returned tags were returned from Chesapeake Bay area; and 5 percent of the tags returned were returned from the south Atlantic, all within the next three years.

Q And of those tags in the mid Atlantic area, what was the same information? A In the mid Atlantic, 6 percent

of the tags were returned from that area; 74 percent were returned from Chesapeake Bay; and 20 percent were returned from the south Atlantic area.

Q And of those tagged originally in Chesapeake Bay, [25] where were they? A Within the next three years, 5 percent of the returned tags were returned from the mid Atlantic area; 25 percent were returned from the Chesapeake Bay area—I'm sorry. I misquoted. 62 percent were returned from the Chesapeake Bay area and 33 percent from the south Atlantic area.

Q And how about those tagged in the south Atlantic? A 3 percent were returned in the mid Atlantic area; 25 percent were returned from Chesapeake Bay; and 72 percent were returned from the south Atlantic area within three years after release as juvenile fish.

These data are viewed by us as being typical based on tagging prior to 1971 and since 1971.

Q Mr. Chapoton, just for information, what was the total number of fish tagged in the year we're talking about? A There were 33,117 juvenile fish tagged in 1971.

Mr. Moore: I want to ask him a couple of questions about those, and I'll give this back to you if you need to refer to it. I just want to refer to it.

Recross Examination

By Mr. Moore:

Q Dr. Chapoton, you say that based on the information you've just recited for us from this chart we're referring to on the returns, you indicate, I believe, that for fish tagged in 1971, [26] of the total number tagged in the north Atlantic region as juveniles, only 10 percent returned to the north Atlantic area, or showed up as catch in the north Atlantic area after three years. Is that— A That's correct.

Mr. Willcox: In the first three years, not after three years.

By Mr. Moore:

Q In the first three years. Is that during three years? A Or within—they were returned as two-year-old fish and they were returned as three-year-old fish.

Q So throughout the three-year period, you accumulated 10 percent of the original group back as catch in the area in which they were tagged in? A Not quite. The tagging was in the north Atlantic and the returns were in the mid Atlantic.

Q Excuse me. All right. A That's all right.

Q Now, that's fish tagged in the north Atlantic region; is that correct? A That's correct.

Q Now, comparing that with those tags in the Chesapeake area, including Virginia and Maryland, of the total number tagged in 1971, during the three years, what percentage returned to the [27] same area in which they were tagged, the Chesapeake area? A 62 percent returned.

Q All right. Going— A Or were found in the catches in the next year or the year after that or the year after that.

Q Now, let's compare that with the mid Atlantic region. Mid Atlantic region, you indicate, I believe, that of the total number tagged in 1971, only 6 percent returned to the mid Atlantic region as catch. A Yes, sir.

Q Then is it fair to say that there's a significantly greater degree of return of those fish which spawned in Virginia waters as compared to those which spawn as juveniles in the waters north of Virginia in the mid Atlantic and New England region? A That's correct.

Q Is it also true then that—is it fair to say then that the populations of menhaden fish do not have the same characteristics of migration and seasonal patterns in one area of the country as they might have in another? A I would agree with that.

Mr. Moore: That's all I have.

Further Redirect Examination

By Mr. Willcox:

Q Mr. Chapoton, that varies with the age of the fish, [28] does it not? A Yes. And with the size of the fish.

Q And if you had been keeping the same statistics seeking only the numbers caught in their fourth or fifth years, as opposed to their first three years, would you have expected that the figures would have been reversed and there would be a far higher number in the north Atlantic area than in the Chesapeake area? A That is true, based on all available information.

Q And this is because the older fish are found farther north, or caught farther north? A That is correct.

Q And there are very few four- and five-year olds, or even three-year olds, in Chesapeake Bay? A That is correct.

Q No matter where they were born? A The center of the population at this time in mid 1970's—comma, comma, you know—appears to be along the Coast from Delaware Bay to Chesapeake Bay southward to North Carolina.

Let me strike that, because I was getting to a new point.

Would you get me again on that?

Q All right. What I asked you was the three, four, five

and older fish, however old they get, are found in substantial numbers north of Chesapeake Bay rather than within it? [29] A Yes, sir. That's correct.

Q And this is not dependent upon where those same fish were spawned? A Not to our knowledge.

Q For whatever reason, the older fish prefer the northern waters, or seem to prefer the northern waters? A They appear to, yes.

Mr. Willcox: I have no further questions.

Mr. Moore: One last question.

Further Recross Examination

By Mr. Moore:

Q Of the yearly catch total in the menhaden industry, what age fish make up the bulk of the commercial catch of menhaden, if you know, based on tag support? A Well, based on tag returns, as well as on daily sampling of the commercial landings throughout the range, in the last three years; that is, 1973, '74 and the current year, 1975, about 70 percent of the total antes are of age two fish.

Normally, it's one and two-year olds with some appreciable contribution from three-year olds.

The fish live to 10 years of age, but there are not normally many fish over seven years of age.

Mr. Moore: Thank you.

[30] Further Redirect Examination

By Mr. Willcox:

Q Do you have an opinion as to the—I guess in terms of crop management or supply management, do you have an opinion as to the ideal makeup of the catch? That is,

what percentage of the total catch should consist of one or two or three or four-year olds? A Studies done by us in recent years indicate that under an ideal average, the catch should be composed of approximately two-thirds one and two-year old fish, those that have not spawned, versus about one-third of those fish three years and greater. That is, those that have spawned or are of spawning age.

Q And in the last few years, what percentage of the total catch has been represented by the less than three-year olds? A Approximately 70 to 80 percent of the total Atlantic catch has been composed of juvenile and one and two-year old fish.

Mr. Moore: I'm all through.

Mr. Willcox: We thank you.

You have the right to have this written up and read it before it is submitted to the court. You also have the right to waive that check and reading, if you are so inclined.

[31] Under the circumstances, we, I think, would recommend that you waive it, but that's your prerogative.

The Deponent: Would it be possible to have a reading over the telephone and to make corrections if any are needed? I'll pay the cost.

(Discussion off-the-record.)

(Signature waived.)

(Whereupon, the deposition was concluded at 3:10 P.M.)

[Jurat omitted in printing]

* * *

STATUTES INVOLVED

Section 28.1-60, Code of Virginia (1950), as amended, found in Volume 5A at page 94

(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Section 28.1-81.1, Code of Virginia (1950), as amended, found in Volume 5A, Supplement, at page 29

(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens of the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of its

stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five per centum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than tweny-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

Section 1081. Prohibition Against Fishing in Territorial Waters; Exceptions

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species

within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Supreme Court, U. S.
FILED
APR 2 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLASS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

The Appellees move the Court to affirm the judgment of the United States District Court for the Eastern District of Virginia on the grounds that the questions presented are so insubstantial as not to need further argument in that the decision below conforms to prior decisions of this Court and involves no more than the application of settled principles of constitutional law to void exclusionary state legislation designed to bar non-residents and foreign-owned corporations from fishing for menhaden in Virginia waters.

Opinion of the Court Below

The order and opinion of the three-judge District Court declaring void §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, and enjoining their enforcement is not

reported. The order and opinion are set forth in the Appendix, *infra,* at p. 32 and p. 33, respectively.

Jurisdiction

Three judges convened under 28 U.S.C. § 2284, granted Appellees' prayer for relief and held two Virginia statutes were unconstitutional. Jurisdiction here by appeal is based on 28 U.S.C. § 1253.

Statutes Involved

The text of the statutes determined to be unconstitutional is set forth in the Appendix at pp. 38-42. Section 28.1-60 of the Code of Virginia in essence prohibits non-residents of Virginia from catching menhaden in the Virginia portion of Chesapeake Bay. Section 28.1-81.1 prohibits a corporation owned by non-citizens of the United States from catching menhaden or any other fish within the three-mile limit of the seacoast of Virginia. Violation of either statute is a misdemeanor.

QUESTIONS PRESENTED

1. Whether enrollment and licensing of menhaden fishing vessels by domestic corporations ultimately owned by non-U.S. citizens, after approval by the Department of Commerce of transfer of such vessels to such corporations, can be nullified by state laws designed to exclude non-residents and non-citizens from competing with instate fishermen?

2. Whether the attempts of the State of Virginia to exclude non-residents from the menhaden fishery of Chesapeake Bay and exclude non-citizens from the menhaden fishery of the Bay and Virginia's marginal seas constitute an unlawful burden on interstate commerce?

3. Whether corporations incorporated and resident in States outside the State of Virginia, ultimately owned by

non-U.S. citizens, the vessels of which are duly enrolled in the U.S. fishery in accordance with approval by the Department of Commerce, are deprived of the equal protection of the laws within the Fourteenth Amendment by exclusionary Virginia statutes which bar non-residents and foreign-owned corporations from fishing for menhaden in Virginia waters?

4. Whether the Federal doctrine of abstention is applicable where state statutes challenged as unconstitutional admit of no saving construction by state courts and the enforcement thereof would cause immediate and irreparable injury?

STATEMENT OF THE CASE

On July 14, 1975 the Appellees filed in the District Court below a Complaint requesting that a three-judge court be convened pursuant to 28 U.S.C. § 2284 to declare §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, unconstitutional and to enjoin the Appellant from enforcement of said statutes. By order entered on November 7, 1975, the District Court granted Appellees' Motion for Summary Judgment, finding both statutes in question unconstitutional and enjoined further enforcement of each statute by the Appellant.

The Appellant, James E. Douglas, Jr., is the Commissioner of Marine Resources for the Commonwealth of Virginia and is charged with responsibility for enforcement of Virginia's statutes regulating commercial fisheries. § 28.1-13, Code of Virginia (1950), as amended.

Appellees are Seacoast Products, Inc. ("Seacoast"), a Delaware corporation duly qualified to do business in the State of Virginia, and its subsidiaries, The New Smith Meal Company, Inc. ("Smith Meal"), a Massachusetts corporation, and Second Oceanic Corporation ("Oceanic"), a New York corporation, all three entities being engaged in the capture and processing of menhaden for fish oil, meal and solubles.

Seacoast in terms of volume is the second largest menhaden fisher. Its principal competitors, Zapata Haynie Corporation ("Zapata Haynie"), first in volume, and Standard Products, Inc. ("Standard Products"), third, have menhaden operations based in Virginia.

The operations of Seacoast were begun in Port Monmouth, New Jersey in 1911 by J. Howard Smith. After his death in the early 1950's, ownership of the business passed to his children and a son-in-law ("Smith Family"). The stock of Seacoast was sold by the Smith Family in December 1973 to a Delaware corporation ultimately owned by Hanson Trust Ltd. a publicly held company of the United Kingdom.

Seacoast itself is a Delaware corporation and its operations should not be confused with the case of foreign fishing fleets not subject to the jurisdiction of the United States. Ultimate alien stock ownership of Seacoast in no way affects United States control over the corporation as to any laws or regulations the United States has imposed, or may seek to impose, on domestic corporations and/or on the fishing industry as a whole.

The transfer of ownership of Seacoast from the Smith Family resulted in no change in Seacoast's mode of operations. The officers and crews of its ships are U.S. citizens as are 95% of the employees in its processing plants in various coastal states.

Approval of Seacoast Transfer by the United States Government

The purchase of the Seacoast stock by the British-controlled Delaware corporation required the approval of the Maritime Administration of the Department of Commerce under Section 37(e) of the Shipping Act, 1916 (46 U.S.C. § 835(e)). Section 37(e)* prohibits the transfer to an alien,

* Section 37 applies during a period of national emergency, and therefore has been applicable since the Presidential Proclamation No. 2914 of December 16, 1950, 15 F.R. 9029.

including a foreign-owned domestic corporation, of majority control of any vessel-owning corporation organized in the United States. In order that the stock purchase not be conditioned upon such approval, however, the Seacoast vessels were temporarily transferred to a nominee, Richard Reiss, a citizen of the United States. Approval of the Maritime Administration of the Department of Commerce was then required for the retransfer of the vessels to Seacoast under Section 37 and, in addition, Section 9 of the Shipping Act, 1916 (46 U.S.C. § 808).

The necessary application for approval was submitted in January of 1974. It was specifically stated that the vessels would be redocumented (by enrollment and licensing) as fishing vessels under the laws of the United States.

In passing upon the application, the Maritime Administration considered, among other things, the acceptability of the foreign purchaser and national defense considerations. It would also have considered the acceptability of any change in flag if it had not been proposed to redocument the vessels in the United States. (46 C.F.R. § 221.7 Appendix.) Because the application involved continued operation by an alien controlled domestic corporation, it was forwarded, pursuant to Maritime Administration policy, to the National Oceanic and Atmospheric Administration ("NOAA") for investigation and comment.

NOAA's policy in regard to such transfers is set forth in a public statement dated October 16, 1973, 38 F.R. 29239, and provides in part as follows:

> "Under present law aliens may own controlling interests in U.S. fishing companies operating U.S.-documented fishing vessels. Ownership and control of a U.S. company by foreign interests does not alter the fact that any such company is still a U.S. company and as such is subject to all U.S. laws and regulations. Consequently, the provisions of law relating to, among other things, employment and compensation of alien workers, exports and imports of products, operations

of U.S.-documented fishing vessels, international agreements to which the U.S. is a party, and fishing regulations would apply to foreign-owned U.S. fishing companies.

• • •

NOAA will investigate and evaluate each application on its individual merits with consideration being given to, among other things, the impact of the proposed transaction on (a) conservation and management of the fisheries resources, (b) the employment of U.S. citizens, (c) U.S. consumers, (d) competition, and (e) other social and economic factors. In doing this, NOAA will review and evaluate the operational plans of the company as well as the extent of foreign investment in the particular fishery in which the company plans to operate."

After widespread notice, public hearings, the first of their nature, were held on March 20-21, 1974 and covered the subjects with which NOAA was particularly concerned as set forth in its interim statement of policy aforesaid. At the outset of the hearings, the Chairman outlined the purpose and format of the proceedings:

> " 'As I previously indicated, the focus of this hearing will be on the fishery aspects of the proposed transfer.
>
> We will further address such considerations as the possible effects of the transfer upon (1) the Menhaden resource involved; (2) the aggregate of fishing/processing companies on whose behalf the transfer is sought; (3) upon the Menhaden segment of the commercial fishing industry; and (4) upon consumers of fish meal, fish oil, and fish solubles which these companies have produced.' " Affidavit of David H. Clarke, p. 4.

During the ensuing investigation, statements were offered in support of the application by various representatives of Seacoast and opposing comments were made by its primary competitors, Zapata Haynie and Standard

Products. The hearings on the application to retransfer sixty-eight vessels to Seacoast resulted in a favorable recommendation by NOAA to the Maritime Administration. In so doing, there was the necessary finding that the application was consistent both with protection of the fisheries, one of the paramount concerns set forth by NOAA, and also with the United States social and economic interests.

The Department of Commerce (through the Maritime Administration) granted the application for transfer of the vessels to Seacoast and Smith Meal and their redocumentation as United States fishing vessels, and issued Transfer Orders approving such transfers. The Department in such circumstances is authorized by law, if it grants such approval, to grant it "either absolutely or upon such conditions as the Secretary prescribes." 46 U.S.C. § 839. The approval was granted *unconditionally.*

After the Department of Commerce issued its Transfer Orders approving the transfer of the vessels, the vessels were all redocumented (by enrollment and licensing) as fishing vessels of the United States.

Upon enrollment, they were "deemed vessels of the United States entitled to the privileges of vessels employed in the . . . fisheries." 46 U.S.C. § 251(a). As such vessels of the United States, they were entitled to "engage in the fisheries within the territorial waters of the United States." 16 U.S.C. § 1081.

Commercial Menhaden Fishing in the United States

Menhaden is a species of inedible, migratory fin fish which, during their summer migration, remain relatively close to the coastline. Fishing for menhaden is therefore concentrated during this summer migratory period when they are close inshore and travel in large, thickly packed schools. It is not feasible commercially to capture menhaden outside the three mile limit. Thus practically all menhaden are captured within State territorial waters.

From approximately June through October of each year, large quantities of menhaden are found close to shore within the territorial waters of the States located on the Atlantic Ocean. During those months, fishing for menhaden is effected within the territorial waters of the particular State where the fish may appear at the time, whether such State be Virginia or some other state bordering on the Atlantic seaboard.

Menhaden processing results in three products, fish meal, used principally for poultry feed, fish solubles, an ingredient of animal feed, and fish oil, exported primarily to Europe and Canada for use in the manufacture of margarine.

Appellees Seacoast and its subsidiaries, predecessors or affiliates have, over the years, caught substantial amounts of menhaden within the territorial waters of Virginia and in so doing have lawfully applied for and received licenses for such activities from the Commonwealth of Virginia until the enactment of the challenged legislation in 1975.

Virginia Menhaden Legislation

After approval by the Department of Commerce of the transfer of the fishing vessels to Seacoast a Virginia congressman (Hon. Thomas N. Downing) at the request of Seacoast's competitor Zapata Haynie, introduced a bill, H.R. 17048 designed to prevent Seacoast from fishing in all American waters on the grounds that it was foreign owned. After the defeat of this bill, the 1975 Virginia General Assembly passed, without notice, as special "emergency" legislation a statute ultimately embodied in § 28.1-81.1 of the Code of Virginia (1950), as amended, the text of which is found in App. p. 41. The Virginia enactment was introduced in the General Assembly through the efforts of counsel for Zapata Haynie.

It was conceded by Appellant James E. Douglas, Jr., Commissioner of Virginia Marine Resources, who is responsible for enforcing § 28.1-81.1, that at the date of passage of this legislation it affected only the Appellees (Deposition, p. 5), and had no conservational value. Deposition, pp. 24, 27.

Furthermore, Appellant acknowledged that this enactment would not prevent domestic menhaden corporations from engaging in predatory fishing practices. Deposition, pp. 37-38.

On May 22, 1975, Appellee Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Commission, Smith Meal was informed that such licenses were not available to corporations, such as Smith Meal, controlled directly or indirectly by foreign interests, citing § 28.1-81.1 of the Code of Virginia, as amended.

The Commonwealth of Virginia has for a number of years forbidden *non-resident* fishermen, individual and corporate, from fishing for menhaden within Chesapeake Bay, § 28.1-60(3), Code of Virginia (1950), as amended.

Appellees, by virtue of this statute, are precluded from pursuing menhaden into Chesapeake Bay simply because they are not Virginia corporations and by virtue of their ultimate alien ownership. Again, the practical effect of this legislation is the prevention of menhaden fishing in these waters by only one commercial fisher, Seacoast and subsidiaries, which in turn are the only real competitors of the Virginia menhaden fishing corporations, Zapata Haynie and Standard Products. Deposition of Robert B. Chapoton, p. 23.

Penalties

Violations of Virginia Code § 28.1-60(3) and § 28.1-81.1 constitute misdemeanors under § 28.1-60(6) and § 28.1-187 of such Code, and the Commissioner of Marine Resources, any member of such Commission, all inspectors, police

captains and other employees designated by the Commissioner in the service have the power, with or without warrant, to arrest any person or persons violating any of the fish or shellfish laws, and to seize any vessel, boat, craft, motor vehicle, conveyance or other thing used in such violation. § 28.1-185 Code of Virginia (1950), as amended.

ARGUMENT

I

Introduction

In light of the strenuous efforts of the Appellant and even more the *Amici* to convert this case into a test of conservation measures adopted on behalf of a beleaguered industry to protect an imperiled natural resource against the much publicized depredations of the Russian trawler fleet, some preliminary clarifying remarks seem warranted.

(a) It should be noted at the outset that the Virginia statutes held unconstitutional are not conservation statutes, but rather are clearly designed to protect Virginia based menhaden fishery companies against competition from non-residents and non-citizens in Chesapeake Bay and in the marginal seas out to the three mile limit.

(b) The menhaden supply is not imperiled by foreign vessels. Menhaden can be taken commercially only near the shore when they are in schools or in bays such as the Chesapeake, the Delaware, Long Island Sound and Narragansett. Consequently, foreign flag vessels restricted to activities beyond the territorial limits are not a factor in the domestic menhaden fishery.

(c) For all practical purposes, the harvest of menhaden on the Atlantic and Gulf coasts is dominated by three companies, Zapata Haynie, Standard Products, both having menhaden operations based in Virginia, and Seacoast, a

Delaware corporation with its principal office in New Jersey. Seacoast's subsidiaries, Oceanic and Smith Meal, are New York and Massachusetts corporations, respectively.

The ultimate question presented by this appeal is whether the State of Virginia can lawfully exclude non-residents or non-citizens, as defined by Virginia to include domestic corporations ultimately owned by foreign nationals, using U.S. flag vessels duly enrolled for the U.S. fishery with the approval of the Maritime Administration of the Department of Commerce, from competing in the menhaden fishery in Virginia. In considering this question and the more immediate question of whether this Court should note probable jurisdiction or affirm the decision below, Appellees submit that long settled principles of constitutional law support the following conclusions:

1. The enrollment and licensing of Seacoast's menhaden fishing vessels for the U.S. fisheries after the affirmative action of the Maritime Administration, following a hearing, approving retransfer of such vessels to Seacoast settled the issue of their right to fish in U.S. waters, which right cannot be nullified by state law.

2. The discriminating Virginia statutes challenged imposed an unlawful burden on interstate commerce.

3. The Virginia statutes in dispute deprived Appellees of the Equal Protection of the laws.

4. The doctrine of abstention should not be applied to the issues presented here.

II

The enrollment and licensing of Seacoast's fishing vessels for the United States fisheries after the affirmative action of the Maritime Administration, following a hearing, approving transfer of such vessels to Seacoast

settled the issue of their right to fish in United States waters which right cannot be nullified by state statutes.

A. Federal Statutes Providing for the Licensing of Fishing Vessels Deprive Virginia of the Power to Enact Contrary and Inconsistent Licensing Statutes Based On Residency and Alienage.

Vessels of the United States enrolled and/or licensed for the fisheries, and only such vessels, are entitled to engage in fishing in United States territorial waters. This has been true since the enactment of the Acts of February 18, 1793, now codified as 46 U.S.C. § 251(a), which provides that such vessels "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the . . . fisheries." The very license (the "Consolidated Certificate of Enrollment and License") issued by the United States Coast Guard to the Seacoast vessels provides (as 46 U.S.C. § 263 requires it to provide) that a "License is hereby granted for the said vessel to be employed in carrying on" a designated fishery (in this case the fishery which includes menhaden). This policy was restated in 16 U.S.C. § 1081 which was enacted in 1964 for the sole purpose of clarifying and enforcing 46 U.S.C. § 251(a). The Report of the House Committee on the Merchant Marine and Fisheries, H.R. Rep. No. 1356, 88th Cong., 2d Sess. (1964); The Report of the Senate Committee on Commerce, S. Rep. No. 500, 88th Cong., 1st Sess. (1963); Section 1081 provides, in part, that:

> "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . ."

The Court below held, properly, that Section 1081 invalidated the Virginia statutes involved in this case because they preempted Virginia's power to enact statutes incon-

sistent with or contrary to Section 1081. The Appellant and the *Amici* have attempted to read the Court's decision as claiming that Section 1081 preempts all power of Virginia with respect to fishing in its territorial waters. They then argue that such exaggerated holding is invalid. The Court's holding, however, does not go to any such length and therefore, as will be discussed below, the arguments of the Appellant and the *Amici* are beside the point. In the context of this case the Court's holding below is clear and correct; 16 U.S.C. § 1081 has preempted the power of Virginia and every other State to say that some licensed United States fishing vessels may fish in territorial waters but some may not.

There can be no doubt, and the Court below correctly held, that the Seacoast vessels were entitled to enrollment and licensing for the fisheries. As outlined in the Statement of The Case, United States law requires that before vessels documented in the United States may be transferred to an entity controlled even indirectly by foreign interests, the transfer must be approved by the Department of Commerce with forfeiture of the vessels, fine and/or imprisonment as penalties for non-compliance. 46 U.S.C. §§ 802, 808, 835. As is also outlined in the Statement of The Case, only after an investigation of and public hearings on the impact of the operation of the Seacoast vessels as U.S. flag vessels by a foreign controlled U.S. fishing company, was approval obtained, and such approval was given unconditionally. The vessels were entitled to be and were duly enrolled and licensed as United States fishing vessels, 46 U.S.C. §§ 11, 252.

The *Amici* attempt to denigrate the significance of the Department of Commerce approval by stating in their brief, footnote page 4, that the approval was only of the transfer of title to Seacoast; that it did not pass upon their operation as United States fishing vessels by a foreign controlled company and that in fact, Seacoast, once it re-

ceived approval, could have registered the vessels under some other flag. All of these propositions are untrue. The application to the Maritime Administration was for approval of the transfer of the vessels to Seacoast for operation under United States flag. The consequences of the operation of the vessels under United States flag by a United States fishing company controlled by particular foreign interests was the very substance of the matters considered by the Maritime Administration and the National Oceanic and Atmospheric Administration. Registration of the vessels by Seacoast under the laws of another flag would have been a violation of 46 U.S.C. §§ 808 and 835 and, as stated in the Statement of The Case, application for approval for such registration would have required the Maritime Administration to consider additional and different questions.

The effect of Virginia Code § 28.1-60, denying Appellees a license to pursue menhaden in Chesapeake Bay because of non-residency, and Virginia Code § 28.1-81.1, denying Appellees a license to catch menhaden in Chesapeake Bay or within three miles of Virginia's coastline due to ultimate control of Appellees by an alien corporation, is to nullify the federal approval of the transaction and the enrollment and licensing of these vessels.

If Virginia has such authority, then all the remaining states may do likewise, thereby completely depriving Appellees of the use to which these vessels have always been put.

Such State action is constitutionally impermissible as has been settled since the landmark decision of *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

See also *Harman* v. *Chicago*, 147 U.S. 396, 406-407 (1893), where this Court concluded,

> "Of course, the [tax] ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No State can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow-boat, towing vessels or craft for hire in the Chicago River or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign."

More recently, this Court noted that " '[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress.' " *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963), citing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1851). See also *Moran* v. *New Orleans*, 112 U.S. 69 (1884).

B. Since 16 U.S.C. § 1081 Preempted Only the Power of States to Discriminate among U.S. Flag Fishing Vessels It Did Not Affect Other Powers of States to Enact Non-Discriminatory Fishing Regulations for Their Territorial Waters.

The *Amici* point out that 16 U.S.C. § 1081 provides for an exception to the prohibition against foreign flag vessels fishing in the U.S. territorial waters if the Secretaries of State and Commerce certify that such an exception is in the national interest and if the concurrence is obtained "of any State . . . directly affected." The *Amici* also point to statements in the House and Senate Committee Reports to the effect that 16 U.S.C. § 1081 did not preempt the powers of the States against "trespassers of their territorial waters". From these arguments the *Amici* conclude that Section 1081 was not intended to limit in any way the

powers of the States regarding their territorial waters. The language of Section 1081 and the Committee Reports cannot possibly bear such meaning, however.

Permitting the States to concur, or not, in a relaxation of the ban on foreign flag fishing vessels can hardly be relevant to the affirmative right granted to U.S. fishing vessels. Nor can preserving to the States the power to prohibit "trespassers" be construed to give the States a right to exclude U.S. flag vessels as "trespassers". As the brief of the *Amici* points out, the Committee Reports and Hearings are replete with references to the power of the States to punish "trespassers" in their territorial waters; but such references are in every case references to foreign flag vessels. For this reason the Reports even describe Section 1081 as a "supplement" to State statutes punishing such "trespassers". There is nothing surprising in any of these references and statements, of course, since the whole purpose of Section 1081 was to limit fishing in the U.S. territorial waters to U.S. vessels and to prohibit it to foreign flag vessels.

Finally, the *Amici* argue that Section 1081 could not have been intended to eliminate all state power over the regulation of territorial waters, because it would thereby have repealed large portions of the Submerged Lands Act, 43 U.S.C. § 1301, *et. seq.*, the Contiguous Fisheries Zone Act, 16 U.S.C. § 1091, *et seq.* and the Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.* Since, however, Section 1081 was not intended to eliminate all State power but only make clear that U.S. vessels can and foreign vessels cannot fish in territorial waters, it, and the holding of the Court below, have no such effect upon such statutes. The States can continue to exercise their rights under such statutes, and can no doubt, for example, enact many kinds of non-discriminatory conservation and regulatory measures such as laws establishing closed seasons or net sizes to be used. What they are not free to do is to discriminate among those U.S. flag vessels which may fish in their waters.

C. Justifications For The Virginia Statutes as Conservation Statutes or as Intended to Close a "Loophole" in Federal Statutes Are Invalid.

Appellant contends, however, that invalidation of federal enrollment and licensing is warranted in that Virginia statutes prevent the destruction of the menhaden fisheries. In the first instance, the discussion in Section A above admits of no such State power no matter how worthy the goals toward which it is exercised.

Secondly, the challenged laws have no conservational value as admitted by the Appellant who is the Commissioner of Virginia Marine Resources and charged with the enforcement of these enactments. He has conceded that conservation is not affected inasmuch as the predatory practices which have impaired other Virginia fisheries such as herring occur not only beyond Virginia's three-mile jurisdiction but outside the national twelve-mile boundary (Deposition of James E. Douglas, Jr., pp. 24, 27), that both prior to and during the legislative consideration of Virginia Code § 28.1-81.1 (the alienage statute) there had not existed any danger of the invasion of Virginia waters by foreign fishermen through "shell corporations" or otherwise, particularly in light of United States law precluding them, namely 46 U.S.C. § 808 and 16 U.S.C. § 1081 (Deposition, pp. 27-29, 31, 41-43), and that domestic Virginia menhaden fisheries could engage in the most vicious, predatory fishing practices with impunity under these laws (Deposition, pp. 37-38).

Appellant further admitted that the Virginia statutes applied only to the Appellees (Deposition, p. 5), who had heretofore obtained Virginia licenses routinely.

Despite these admissions, the argument is advanced on behalf of Appellant that Virginia's alienage restriction (Code § 28.1-81.1) closes a "loophole" in existing federal legislation by preventing foreign interests from establishing domestic "shell corporations" which in turn acquire

enrolled United States fishing vessels. The difficulty with Appellant's argument is that there is no such "loophole", there is instead a coherent national policy, developed since the earliest days of this nation, that closes all loopholes.

A corporation organized in a State of the United States of which the chief executive officer, the chairman of the board and all directors except a minority of the number necessary to constitute a quorum are United States citizens may document United States fishing vessels, but only if its acquisition of such vessels or the acquisition by aliens of its stock was lawful, that is approved by the Department of Commerce, under 46 U.S.C. §§ 808, 835. Therefore, there is no "loophole" through or any other way around the requirement for Department of Commerce approval of the means by which foreign interests may acquire or document United States flag fishing vessels.* The one described in Appendix C to the brief of the *Amici* is an illusion. Contrary to the statement therein, Hanson Trust Ltd., Appellee's ultimate owner, a U.K. corporation, could not, without complying with 46 U.S.C. § 835(e), sell the stock of corporations owning Seacoast's fishing vessels to a company controlled by Russians.

Under settled principles of Federal supremacy and preemption, the conclusion is compelled that when vessels of a foreign-owned corporation are enrolled into the U.S. fishery by the Federal government as here, the States are not free to wipe out any practical use of that enrollment. *Toomer* v. *Witsell,* 334 U.S. 385, 393, 394 (1948); *United States* v. *California,* 332 U.S. 19 (1947).

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* Such a corporation could not even, without such approval, document a new vessel as a United States fishing vessel. Foreign built vessels cannot be enrolled as fishing vessels 46 U.S.C. §§ 11, 252, 46 C.F.R. § 67.01-5(i), and the transfer to such a corporation of a vessel built in the United States, at whatever stage of construction, would require approval under 46 U.S.C. § 835.

III

The discriminatory Virginia statutes challenged impose an unlawful burden on interstate commerce.

It is clear from the circumstances outlined in the Statement of The Case that the recent "emergency" legislation passed by the Virginia General Assembly (Virginia Code § 28.1-81.1) precluding Appellees from obtaining a menhaden license to fish in the territorial waters of that Commonwealth applies to only one of the three principal menhaden fishers in this country, the two to which it is inapplicable being Zapata Haynie and Standard Products with their menhaden operations based in Virginia. Similarly, the restriction contained in Virgina Code § 28.1-60(3) precluding non-residents from taking menhaden in Chesapeake Bay in practical effect excludes only the Appellees. The anti-competitive and discriminatory effects of these statutes is obvious. As such, they constitute an unjustifiable burden on interstate commerce prohibited by Article I, Section 8 of the United States Constitution.

In adopting this portion of the Constitution, the drafters of that document sought to rid the Union of the commercial provincialism which the contested Virginia legislation represents. As noted by Mr. Justice Cardozo, the Constitution ". . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig,* 294 U.S. 511, 523 (1935).

In *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949), the court observed that

> "*Baldwin* v. *Seelig,* 294 U.S. 511, is an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests

by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." 336 U.S. at 535.

There can be no doubt that the menhaden industry constitutes an integral part of interstate commerce in the United States, both in the capture and processing of these fish. The industry employs a large number of people, pays substantial taxes, both State and federal, represents a tremendous investment in the United States economy in terms of dollars and comprises, on the basis at least of tonnage of fish caught and processed, the largest fishing industry in this country.

In the analogous case of *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928), the Court noted that while the State of Louisiana could deny the export of shrimp beyond State boundaries and thereby conserve the catch for intrastate consumption, it could not permit exportation of only headless and hulled shrimp thereby favoring its own canning and manufacturing plants.

As with Virginia's menhaden laws,

> ". . . in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control." *Id.* at 13.

Under such circumstances, ". . . the protection of the commerce clause attaches at the time of taking." *Id.*

That the capture of shrimp and other marine fish and the processing and sale thereof constitute "interstate commerce" entitled to the protection described is affirmed by the *Foster-Fountain* decision. *Id.* at 10.

The commerce clause is a limitation on the power of States even in the absence of action by Congress. *Morgan* v. *Virginia,* 328 U.S. 373, 378-79 (1946). If any one of the several States of the United States which border on the Atlantic seaboard may prevent non-citizens from fishing for menhaden within its territorial waters and/or prevent non-residents from fishing for menhaden within certain arms of the sea, collectively all such states have the potential of destroying this industry which is of such national importance. Menhaden have no regard for State boundaries. They spawn primarily in the open ocean, come into Virginia waters as part of a cyclic migration and may visit all of the States from Florida to Massachusetts in their lifetime. It is their nature to move from State to State. The vessels that harvest them must be free to follow. Exclusionary statutes such as Virginia's invite retaliation from other States and countries. Virginia would not be permitted to dam the Chesapeake and prevent the migratory fish there from returning to the sea or visiting other States. Similarly its attempt to wall out non-Virginians from access to the fishing grounds must fail.

IV

The Virginia statutes in dispute deprive appellees of the equal protection of the laws.

Virginia Code § 28.1-81.1 precludes *non-citizens* from obtaining a commercial fishing license for operations within the territorial waters of the Commonwealth.

With regard to State legislation directed against non-citizens, this Court has taken the position that any classifications based upon alienage or non-citizenship ". . . are inherently suspect and subject to close judicial scrutiny."

Graham v. *Richardson,* 403 U.S. 365, 372 (1971). See also *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943); *Korematsu* v. *United States,* 323 U.S. 214 (1944); *Takahashi* v. *Fish & Game Comm'n.,* 334 U.S. 410 (1948); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

The *Takahashi* decision is particularly relevant in that it involved the denial of a commercial fishing license to non-citizens by the State of California, just as does the challenged Virginia statute. The Supreme Court of California held that the State had such a proprietary interest in the fish in its ocean waters as to bar all non-citizens from catching them. 334 U.S. at 414. This Court rejected that contention and abrogated the statute, observing that non-citizens are entitled to the equal protection afforded by the Fourteenth Amendment (334 U.S. at 415-16), which safeguard applies to "all persons." 334 U.S. at 420. It is to be noted at this point that while corporations are not deemed citizens of the United States so as to afford them the benefits of the "privileges and immunities" clause of the Fourteenth Amendment (*Orient Insurance Company* v. *Daggs,* 172 U.S. 557, 561 [1869]), it has always been held that corporations are entitled to the "equal protection" aspects of that Amendment, as applied in *Takahashi. Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936).

Furthermore, in *Takahashi* the Court concluded that "[t]o whatever extent the fish in the three-mile belt . . . may be 'capable of ownership' by California, . . . that 'ownership' is inadequate to justify . . ." excluding non-citizens from fishing in the ocean while permitting others to do so. 334 U.S. at 421.

Appellant contends that the *Takahashi* holding has been diluted if not overturned by enactment of the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* But that legislation granted the States no greater right to the lands and resources involved than the States previously enjoyed. "The Act merely confirmed the States' pre-existing rights in the beds of the navigable waterways within their boundaries

by, in effect quitclaiming all federal claims thereto." *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 318 (1973). The *Takahashi* decision was not premised upon superior title to marine fish in the federal government but held that such wildlife was by nature incapable of such "ownership" as to justify discriminatory legislation like the Virginia statutes in question. State control over these resources must of course comply with all constitutional requirements and must be exercised so as to preserve to all persons lawfully admitted to this country the guarantees of the Fourteenth Amendment.

Furthermore, the Submerged Lands Act specifically reserved to the United States, as to the affected lands, waters and resources, all its rights and powers for the constitutional purposes of commerce and navigation. 43 U.S.C. § 1314 (a). There is nothing in the Submerged Lands Act that restricts the enrollment of vessels in the U.S. fisheries as was done here. This power has not been delegated to the States.

The status of wildlife and state regulation thereof has been considered by the Supreme Court on several other occasions,

> ". . . [b]ut in only one case, *McCready* v. *Virginia,* 94 U.S. 391 (1876), has the Court actually upheld state action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination. In that case the Court sanctioned a Virginia statute applied so as to prohibit citizens of other states, but not Virginia citizens, from planting oysters in the tidal waters of the Ware River. The right of Virginians in Virginia waters, the Court said, was 'a property right, and not a mere privilege or immunity of citizenship'. And an analogy was drawn between planting oysters in a river bed and planting

corn in state-owned land." *Toomer* v. *Witsell,* 334 U.S. 385, 400-401 (1948) (footnote omitted).

The *Toomer* case involved a challenge to a South Carolina law regulating commercial shrimp fishing in the three-mile maritime belt off the coast, partly through heavier taxes on non-resident shrimp fishermen. The court outlined the migratory cycle of shrimp which is very similar to that of menhaden, the fishermen in each case following the migration as it moves from the territorial waters of one state to another. 334 U.S. at 387-88. In striking down the statutes, the *Toomer* decision pointed out the reasons why the *McCready* rationale was inapplicable to the shrimp statutes and to the menhaden legislation challenged herein.

> "It will be noted that there are at least two factual distinctions between the present case and the *McCready* case. First, the *McCready* case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily. Secondly, the *McCready* case involved regulation of fishing in inland waters, whereas the statute now questioned is directed at regulation of shrimping in the marginal sea.
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> However satisfactorily the ownership theory explains the *McCready* case, the very factors which make the present case distinguishable render that theory but a weak prop for the South Carolina statute. That the shrimp are migratory makes apposite Mr. Justice Holmes' statement in *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920), that 'To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.' Indeed, only fifteen years after the *McCready* decision, a unanimous Court indicated that the rule of that case might not apply to

> free-swimming fish [citing *Manchester* v. *Massachusetts,* 139 U.S. 240, 265 (1891)]. The fact that it is activity in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownership doctrine.
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> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states." 334 U.S. at 401-02 (footnote omitted).

Thus, any assertion by the State of Virginia that its "ownership" of the migratory menhaden justifies denying Appellees a license because of the alien ownership of the stock of their parent corportion is legally unsound, particularly where the Appellees are domestic corporations, subject to all United States laws.

The sovereignty of the Commonwealth of Virginia also does not encompass the power to deny Appellees, as *non-residents,* the right to follow and catch menhaden in Chesapeake Bay, which body of water is as wide as thirty miles, bordered also by the State of Maryland and separated from its source, the Atlantic Ocean only by a narrow peninsula off the Virginia mainland. The power of Virginia to regulate menhaden fishing therein is certainly not comparable to the State's power to regulate fishing in its inland rivers. *Toomer* v. *Witsell,* 334 U.S. at 401, distinguishing and circumscribing the holding in *McCready* v. *Virginia, supra.*

Particularly relevant to the constitutionality of Virginia's prohibition of non-resident menhaden fishing in Chesapeake Bay (Virginia Code § 28.1-60) is the case of

Edwards v. *Leaver,* 102 F. Supp. 698 (D.R.I. 1952) in which a special three-judge court struck down a Rhode Island statute preventing non-residents from fishing for menhaden north of a line running from Point Judith Light to Brenton Reef Lightship and Sakonnet Light, thus reserving for residents only the opportunity to take menhaden in Narragansett Bay and the Sakonnet River. The factual circumstances thus are indistinguishable from those in this litigation.

Citing *Toomer* v. *Witsell, supra,* the *Edwards* court rejected the contention that the challenged statute represented a proper regulation of Rhode Island inland fisheries and stated:

> "That a discrimination is being made against non-residents is clear from a mere reading of the statute. The magnitude of the discrimination is disclosed by the evidence. It virtually excludes all non-residents from catching or taking with purse net or seine menhaden by denying to them licenses by which they might lawfully engage in such fishing and subjects them to heavy penalties for failure to procure such licenses. No such prohibition exists as to residents of this State. This disparity of treatment between residents and non-residents requires an adequate explanation if the statute is to be sustained as proper exercise of the state's police power.
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> To paraphrase the language of the Supreme Court in the *Toomer* case, . . . The statute must be held unconstitutional unless menhaden fishing in the designated area 'falls within some unexpressed exception to the privileges and immunities clause.' We conclude that the statute does not meet this test.
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> Menhaden are free-swimming fish and as was pointed out in the *Toomer* opinion, the case of *McCready* v. *State of Virginia,* . . . is clearly distinguishable on that fact.

> In view of the discriminatory character of this statute, we do not regard as important the fact that the area designated by the statute may be regarded as inland waters. The important fact is that menhaden are migratory fish. We hold, in accordance with the ruling of the *Toomer* case, that menhaden fishing in the designated area is within the purview of the privileges and immunities clause.
>
> It is of course clear that the corporations here are not citizens within the meaning of the privileges and immunities clause. However, they are persons within the meaning of the equal protection and due process of law clauses. See *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936); *Providence Journal Co.* v. *McCoy,* D.C., 94 F. Supp. 186, affirmed, 1 Cir., 190 F. 2d 760, certiorari denied 342 U.S. 894, 72 S. Ct. 200. The corporate plaintiffs, therefore, are entitled under the equal protection clause to relief against the discrimination sanctioned by this statute." 102 F. Supp. at 702-703.

Residency fishing statutes like the Virginia enactment have been consistently voided as violative of the constitutional guarantees and a burden on interstate commerce. *Brown* v. *Anderson,* 202 F. Supp. 96, 103 (D. Alaska 1962); *Gospodonovich* v. *Clements,* 108 F. Supp. 234, 237 (E.D. La. 1951); *Russo* v. *Reed,* 93 F. Supp. 554, 559-60 (D. Me. 1950).

In a recent decision of the Supreme Judicial Court of Massachusetts, *Commonwealth* v. *Westcott,* 1976 Mass. Adv. Shts. 696 (March 12, 1976) that Court applied an analysis closely parallel to that of the *Edwards* court and struck down as unconstitutional a Massachusetts statute (Statute 1923, C. 35 as amended by St. 1962, C. 219) which prohibited non-residents from dragging for fish in Vineyand Sound during the months of July, August and September. Charges against the individual defendant were dismissed based on the Court's conclusion that the statute there in question

violated the privileges and immunities clause of the U.S. Constitution and its specific rejection of the Submerged Lands Act argument advanced by Appellants herein.

When tested against long settled principles of constitutional law including the supremacy clause, Federal preemption, unlawful burdens on interstate commerce, or the equal protection clause, it is clear that the two Virginia statutes cannot stand. The decision of the Court below was correct and further briefing and argument are unnecessary. The Virginia laws are simply parochial attempts to protect Virginians from competition in the menhaden fishery despite the conclusion of the Department of Commerce that Appellees could continue to operate their U.S. flag vessels in the pursuit of menhaden in U.S. waters. In the face of clear, long established precedents supporting the decision below, the questions raised by appellants are not substantial.

V

The Federal doctrine of abstention is not applicable where State statutes challenged as unconstitutional admit of no saving construction by State Courts and the enforcement thereof would cause immediate and irreparable injury.

Appellant contends that the lower Court should have abstained in this matter, thereby permitting the Virginia judiciary an opportunity to construe the challenged statutes.

As a basic premise, since the inception of the "abstention doctrine" in *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496 (1941), its application has been held proper "only in narrowly limited 'special circumstances.'" *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967), quoting *Propper* v. *Clark*, 337 U.S. 472, 492 (1949).

In addition, the judicial precept has been established that where State laws are challenged on constitutional grounds abstention will be resorted to only if such laws are in fact unclear and hence subject to an interpretation

which might resolve the constitutionality question. *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965); *Reetz* v. *Bozanich*, 397 U.S. 82, 86 (1970); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971). There must be a reasonable probability that the State statute can be interpreted in such a manner as to render it constitutionally sound and ". . . abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." *Zwickler* v. *Koota*, 389 U.S. at 251.

It is the position of the Appellees that Virginia Code §§ 28.1-60(3) and 28.1-81.1 are, in fact, clear and not subject to any reasonable interpretation, short of complete revision or nullification, which would alter their facial unconstitutionality. The statutes are plainly based upon categorizations according to citizenship and residency, classifications which the Supreme Court has repeatedly held are "inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). Nor do Appellees consider invocation of the abstention doctrine in this instance necessitated by *Reetz* v. *Bozanich*, 397 U.S. 82 (1970), relied upon by Appellant. That case did *not* involve a challenge to a statute facially suspect as the enactment there applied to all persons, resident and non-resident, citizen and non-citizen.

The *Reetz* decision specifically noted that the abstention doctrine is to be applied only where " 'the issue of law is uncertain' " (397 U.S. at 86), citing *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965). The *Reetz* court also observed that "[t]he instant case is the classic case in that tradition, for here *the nub of the whole controversy may be the state constitution.*" 397 U.S. at 87 (emphasis added). The Court here is not faced with that situation, but rather a challenge, based solely upon federally protected rights, to State statutes which are premised upon inherently suspect classifications and which are not reasonably subject to any construction which would salvage them constitutionally. After *Reetz*, the Supreme Court in the subsequent decision of *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971), took great pains

to point out that the abstention rule only applies where " 'the issue of state law is uncertain.' " The lower court properly acknowledged that the challenged provisions "flagrantly and patently" offend the Appellees' rights under the Fourteenth Amendment and that where ". . . the deprivation of rights was so severe, clear and damaging as here" the forebearance of federal courts is not demanded. App. at p. 34.

CONCLUSION

For the reasons set forth above, Appellees request that the judgment of the United States District Court for the Eastern District of Virginia rendered herein be affirmed.

Respectfully submitted,

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC.,
and
SECOND OCEANIC CORPORATION

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APPENDIX

* * *

FINAL ORDER

Filed November 7, 1975

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, Adjudges, Orders and Decrees:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiffs recover their costs of the defendant.

/s/ ALBERT V. BRYAN
Senior United States Circuit Judge

/s/ RICHARD B. KELLAM
United States District Judge

/s/ JOHN A. MACKENZIE
United States District Judge

November 7, 1975.

* * *

OPINION OF THE COURT BELOW

Filed November 7, 1975

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1 81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

---

1 This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. *United States* v. *California*, 332 US 19, 33 (1947).

2 Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 USC 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 USC 2281 and 2284.

3 There are no critical, genuine factual differences between the parties.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention have no place. In other circumstances they are appropriate: to obtain interpretation of a state statute, *Railroad Commission* v. *Pullman Co.,* 312 US 496 (1941); or to avoid needless interference with the administration of State domestic policies, *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 US 341 (1951); or to avoid obstruction of State prosecutions, *Younger* v. *Harris,* 401 US 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. *Huffman* v. *Pursue,* 420 US 592, 602 (1975); *Younger, supra,* at 53-54; *Zwickler* v. *Koota,* 389 US 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not proposed to conserve the food supply of the State. It is conceded by

plaintiffs that Virginia could exact from them the same licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is *Takahashi* v. *Fish and Game Commission,* 334 US 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on any equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi, supra,* at p. 420, and in *Toomer* v. *Witsell,* 334 US 385, 401 (1948) declined

to treat, as *contra, McCready* v. *Virginia,* 94 US 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 USC 1081, *et seq.,* declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . .", except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. *Toomer* v. *Witsell,* 334 US 385, 393, 394 (1948); *United States* v. *California, supra,* 332 US 19 (1947); *Skiriotes* v. *Florida,* 313 US 69, 75 (1941); *Manchester* v. *Massachusetts,* 139 US 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 USC 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 USC 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens.

Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-mile sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester, supra*—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the

charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in *Toomer* v. *Witsell, supra,* 334 US 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." *Fenner* v. *Boykin,* 271 US 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

• • •

STATUTES INVOLVED

Section 28.1-60, Code of Virginia (1950), as amended, found in Volume 5A at page 94.

(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or

catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not

violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virgina would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the license until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be

served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plantiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Section 28.1-81.1, Code of Virginia (1950), as amended, found in Volume 5A, Supplement, at page 29.

(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens of the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five per centum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

CERTIFICATE OF SERVICE

I, John J. Loflin, Jr., a member of the Bar of the Supreme Court of the United States and one of the counsel for Appellees, in the above-captioned matter, hereby certify that three (3) copies of this Motion to Affirm have been served upon each counsel of record for the parties herein by depositing the same in the United States Postal Office with first class postage prepaid, this 2nd day of April, 1976, as follows:

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Supreme Court, U. S.
FILED
JUN 30 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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Report of the House Merchant Marine and Fisheries Committee, H. R. Rep. No. 1356, 88th Cong., 2d Sess. 15

Report of the Senate Commerce Committee, Senate Rep. No. 500, 88th Cong., 1st Sess. 15

In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF FOR THE APPELLANT

OPINION BELOW

The final order and opinion of the three-judge District Court below are not yet reported. Copies of the final order and opinion are set forth in the Appendix filed with this brief at pages 14 and 16, respectively.

JURISDICTION

The final order and opinion of the three-judge District Court below were entered on November 7, 1975. Notice of Appeal was filed with the District Court below on January 5, 1976. The Jurisdictional Statement of the Appellant was

filed with this Court on March 5, 1976 and this Court noted probable jurisdiction on April 26, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether the Bartlett Act, 16 U.S.C. § 1081, or other federal enactments preempt state authority to regulate commercial fisheries within state inland waters and the three-mile marginal sea?

2. Whether a state law which prohibits foreign-owned corporations from invading commercial fisheries stocks in state inland waters and the three-mile marginal sea is violative of the Equal Protection Clause of the Fourteenth Amendment?

3. Whether a state law which prohibits non-residents from engaging in a commercial fishery within state inland waters is violative of the Equal Protection Clause of the Fourteenth Amendment?

4. Whether state laws limiting eligibility for licenses to take fish in state territorial waters on the basis of residency or citizenship interfere with or unduly burden interstate commerce?

5. Whether the lower court should have abstained from deciding upon the constitutionality of state laws regulating commercial fisheries where there is no infringement of sensitive constitutional guarantees and state court interpretation might resolve or avoid broad constitutional questions?

STATUTES INVOLVED

The statutory provisions directly involved are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1. These statutes are set out in full text in the Appendix, at page 114.

The provisions of the United States Constitution involved are the Supremacy Clause, Article VI, ¶ 2, the Equal Protection Clause, Amendment XIV, § 1, and the Commerce Clause, Article I, § 8, cl. 3.

STATEMENT

This case concerns the right of the Commonwealth of Virginia to protect its valuable but limited fisheries resources from depletion by foreign-owned and controlled commercial fishing corporations and its right to conserve its Chesapeake Bay menhaden fishery by excluding non-residents who are not susceptible to effective enforcement of existing conservation laws.

Section 28.1-81.1 of the Virginia Code limits the issuance of commercial fishing licenses for taking of all fin fish to United States citizens. In respect to corporations the same statute provides that no corporation shall be deemed a citizen of the United States unless at least seventy-five per centum of the interest therein is owned by United States citizens. The provisions of this statute, enacted by the Virginia General Assembly in 1975, apply to the taking of fin fish in all inland Virginia waters, including the Chesapeake Bay and the Virginia three-mile marginal sea.

By Section 28.1-60 of the Virginia Code the taking of menhaden in the Chesapeake Bay, one of Virginia's most valuable fisheries, is limited to Virginia resident persons, firms and corporations. Section 28.1-60(3), however, permits non-residents to take menhaden within the three-mile Virginia marginal sea.

The Appellee, Seacoast Products, Inc., ("Seacoast") is a Delaware corporation with principal offices in New Jersey. The New Smith Meal Company, Inc., a Massachusetts corporation, also has its main offices in New Jersey. Second

Oceanic Corporation is incorporated under New York law and has its principal offices in that state. The New Smith Meal Company, Inc., and Second Oceanic Corporation are both subsidiaries of Seacoast which is, in turn, controlled by Hanson Trust, Ltd. an English corporation wholly owned by alien stockholders.

Contrary to the misundertanding of the lower court, Seacoast has never been engaged in the menhaden fishery within the Chesapeake Bay, since its non-resident status rendered it ineligible for such licenses under § 28.1-60.[1]

Prior to the enactment of § 28.1-81.1 in 1975, Seacoast had licensed some four or five vessels yearly for the taking of menhaden in the Virginia three-mile marginal sea as permitted under § 28.1-60(3). (Dep. James E. Douglas, Jr., App., p. 43). But in terms of actual fishing effort Seacoast has, in recent years, engaged in little or no substantial activity in Virginia waters. (Stipulation, App., pp. 36-37). Upon application for 1975 non-resident menhaden licenses, permitting the taking of menhaden in the marginal sea, Seacoast was denied the same by the Appellant, James E. Douglas, Jr., on the basis of the newly enacted provisions of § 28.1-81.1.[2]

Seacoast thereafter filed, on July 14, 1975, its Complaint seeking temporary and permanent injunctive relief enjoining enforcement of both §§ 28.1-81.1 and 28.1-60 alleging that both statutes were unconstitutional. On November 7, 1975 the three-judge District Court entered its final order and rendered its opinion, finding both statutes invalid. The

[1] The District Court incorrectly states in its opinion that Seacoast had heretofore been granted licenses to take menhaden in the Chesapeake Bay. App., p. 18).

[2] Since Seacoast is controlled by Hanson Trust, Ltd., owned wholly by non-citizens of the United States, it was ineligible for licenses under § 28.1-81.1(b).

lower court found that § 28.1-81.1, limiting issuance of commercial fishing licenses to citizens of the United States, was preempted by the provisions of the Bartlett Act, 16 U.S.C. § 1081 *et seq.* It found § 28.1-60, barring non-residents from the Chesapeake Bay menhaden fishery, violative of the Equal Protection Clause of the Fourteenth Amendment. It is from this judgment that the instant appeal arises.

SUMMARY OF ARGUMENT

I. A. The Bartlett Act, 16 U.S.C. § 1081 *et seq.,* does not preempt state authority to regulate and license commercial fisheries in the three-mile marginal sea. The federal statute (16 U.S.C. § 1081) prohibits foreign flag vessels from fishing in the marginal sea, and therefore, cannot be viewed as preempting state regulations respecting United States flag vessels. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), *Savage* v. *Jones,* 225 U.S. 501 (1912). The states are free to license fishing in the marginal sea within their respective boundaries and to regulate fisheries seasons, equipment, the manner of taking fish and amounts of fish taken, among other things, with respect to United States flag vessels. *Toomer* v. *Witsell,* 334 U.S. 385, (1948), *Skiriotes* v. *Florida,* 313 U.S. 69 (1941). Virginia Code § 28.1-81.1, denying commercial fishing licenses to foreign-owned corporations operating United States flag vessels in the inland waters and marginal sea of Virginia, is not, therefore, preempted by 16 U.S.C. § 1081.

B. The Bartlett Act, 16 U.S.C. § 1081 *et seq.,* does not preempt state authority even as to foreign flag vessels. While the federal law prohibits foreign flag vessels from fishing in the marginal sea generally, but authorizes the Secretary of the Treasury to permit foreign flag vessels as

deemed appropriate, the Secretary of the Treasury's authority to grant permission is conditioned upon concurrence of any affected state. Thus, the federal exercise of authority under 16 U.S.C. § 1081 was never intended to preempt state authority as to foreign flag vessels. *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132 (1963). The Appellee, Seacoast, is a foreign-owned corporation operating United States flag vessels, to which 16 U.S.C. § 1081 does not apply. Seacoast cannot, therefore, benefit from any preemption by 16 U.S.C. § 1081 even if 16 U.S.C. § 1081 did preempt state authority as to foreign flag vessels. But, as is noted above, 16 U.S.C. § 1081 does not preempt state laws respecting foreign flag vessels, requiring state concurrence in any federal permission to fish in marginal seas. Virginia Code § 28.1-81.1 denies licenses to any corporation that is foreign-owned, whether it uses foreign flag vessels or United States flag vessels. Since 16 U.S.C. § 1081 applies only to foreign flag vessels, it cannot be construed as preempting state regulation of United States flag vessels. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). Accordingly, Virginia Code § 28.1-81.1, which denies foreign-owned corporations licenses to take fish in Virginia waters, is not superseded by 16 U.S.C. § 1081 in any respect.

C. The federal statutes under which vessels are enrolled and licensed for the coasting trade and fisheries (46 U.S.C. §§ 251, 259, 260, 263) do not preempt the authority of the states to license vessels for the taking of fish within state territorial waters. The federal enrollment statutes do not confer affirmatively the right to fish in every state's waters irrespective of state licensing requirements or other state fisheries regulations. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Smith* v. *Maryland,* 18 How. 71 (1855).

Since the federal vessel enrollment and licensing statutes were enacted on the basis of the power of Congress to regulate commerce, *Wiggins Ferry Co.* v. *City of East St. Louis,* 107 U.S. 365 (1882), and since the taking of fish and regulation of fisheries within the state is a local matter not a part of commerce, *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), the federal statutes were never intended to confer affirmatively the right to take fish from state waters to the exclusion of state laws to the contrary. The "license" issued to vessels enrolled for the coasting trade and fisheries under federal statutes is for the purpose of identifying the intended use of U.S. flag vessels. Federal vessel inspection laws vary according to vessel use. The approval of the Secretary of Commerce, under 46 U.S.C. § 808, 835, authorizing the sale or transfer of vessels already enrolled and licensed to foreign-owned corporations does not supersede state laws which, like Virginia Code § 28.1-81.1, deny licenses to foreign-owned corporations. The only effect of approval under 46 U.S.C. § 808, 835 is to allow U.S. enrolled vessels to be transferred to foreign-owned corporations. Virginia Code §§ 28.1-81.1 and 28.1-60, which limit licenses for taking of fish in Virginia to citizens and residents, are not, therefore, preempted by federal enrollment and licensing laws (46 U.S.C. § 251, 259, 260, 263) or the statutes regulating transfer of U.S. enrolled and licensed vessels to foreign-owned corporations (46 U.S.C. § 808, 835).

II. Virginia Code § 28.1-81.1, which denies foreign-owned corporations such as Seacoast licenses to take fish in state waters, is a valid exercise of state police powers to conserve fisheries resources against depradations by foreign fishing interests and is permissible under the Fourteenth Amendment. Because the portion of the statute in question

here does not apply to *individual resident aliens,* who may be entitled to certain presumptions emanating from the immigration and naturalization process, but instead applies so as to deny licenses to *foreign-owned corporations,* who are neither *citizens* nor *individual resident aliens,* the "close judicial scrutiny" and "compelling interest" tests applied in *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), In re *Griffiths,* 413 U.S. 717 (1973), and *Graham* v. *Richardson,* 403 U.S. 365 (1971) are not applicable. Under traditional equal protection standards, Virginia Code § 28.1-81.1 is supported by a reasonable basis in fact which justifies its exclusion of foreign-owned corporations from the taking of fish in Virginia waters. Foreign fishing interests do not have the self-interest in fisheries conservation which characterizes United States fishermen. They are not dependent, as United States fishermen, on a continuous resource. Virginia's experience with destruction of its river herring fishery by foreign fleets is a prime example. The predatory practices of foreign fishing interests and the resulting stock depletions are documented in Congressional findings in hearings on the new two-hundred mile fishery zone, Public Law, No. 94-265. Foreign fishing interests, faced with the extension of the U.S. fishery zone from twelve to two-hundred miles offshore, will be likely to seek means to avoid the restrictions of the new law. This may be accomplished by foreign interests who establish shell corporate entities in the United States and purchase American built vessels, thereby becoming eligible to enroll their vessels under federal enrollment and licensing statutes. 46 U.S.C. §§ 251, 252, 11. Federal enrollment of their vessels will entitle foreign shell corporations to fish, without the same regulation applicable to foreign flag vessels, inside the two-hundred mile limit up to the three-mile line. Corporate domicile of the shell corporations in any of the states, irrespective of the citizenship of the stockholders, will enable such foreign interests to fish that state's waters of the three-mile marginal sea as well as the remainder of its inland waters. It is this danger which Virginia Code § 28.1-81.1 seeks to avoid by requiring that corporate licensees be at least seventy-five per cent owned and controlled by United States citizens. Virginia Code § 28.1-81.1 is, therefore, supported by a reasonable basis in fact and is a permissible exercise of state police power to conserve fisheries, consistent with the Equal Protection Clause of the Fourteenth Amendment. *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 471 (1970). Further, the proprietary interest of the states in their commercial fisheries is sufficient to justify exclusion of foreign corporations. *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914), *Truax* v. *Raich,* 239 U.S. 33 (1915). The Submerged Lands Act, 43 U.S.C. § 1301 *et seq.,* gives clear title to the states in all fisheries resources of the marginal sea and inland waters, thereby making inapposite the holding in *Takahashi* v. *Fish Comm'n.,* 334 U.S. 410 (1948).

III. Virginia Code § 28.1-60, limiting licenses for the Chesapeake Bay menhaden fishery to Virginia resident persons and corporations, is a valid exercise of state police power to conserve fisheries. The statute classifies on the basis of *residency* and is, therefore, tested under traditional equal protection standards, requiring a reasonable basis or justification of the statute. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The Chesapeake Bay, an inland body of water, is populated by nursery and young menhaden fish. This particularly fragile resource requires effective enforcement of Virginia's statutes regulating the taking of menhaden in the Bay, particularly Code § 28.1-65, limiting net

mesh size. Enforcement of the statute regulating net mesh size is virtually impossible as to non-resident fishermen since they do not land catches at Virginia ports. Dockside enforcement of the net regulations is the only effective method of enforcement. Virginia residents, moreover, have a greater self-interest in preservation of the Bay menhaden fishery. Non-residents, therefore, constitute the particular source of evil and may, therefore be excluded consistent with the Equal Protection Clause of the Fourteenth Amendment. *Toomer* v. *Witsell,* 334 U.S. 385 (1948). Virginia Code § 28.1-60, limiting Bay menhaden licenses to residents, is, therefore, justified by a reasonable basis in fact and is a permissible exercise of police power in conserving fisheries. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). In addition the proprietary interest of the state, alone, is sufficient to support Virginia's exclusion of non-residents from taking fish from its inland waters. *McCready* v. *Virginia,* 94 U.S. 391 (1877).

IV. Virginia Code §§ 28.1-60 and 28.1-81.1 limit licensing for the "taking of fish" within the territorial waters of Virginia. The "taking of fish" is not a part of commerce among the states, *Toomer* v. *Witsell,* 334 U.S. 385 (1948), nor is the regulation of fisheries a regulation of commerce. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). Nor do the statutes in any manner burden or interfere with the flow of commerce. Neither statute regulates or impedes navigation. Since neither statute restricts the flow of fish in commerce into or out of the state after being taken, they impose no burden upon interstate commerce. *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422 (1936).

V. The Court below should have abstained to avoid interference in state administration of its domestic policies and programs relative to fisheries, traditionally recognized as a

local matter. *Alabama Public Service Commission* v. *Southern Rwy. Co.,* 341 U.S. 341 (1951), *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943), *Great Lakes Dredge Co.* v. *Huffman,* 319 U.S. 293 (1943). Since the application of § 28.1-81.1, denying license to persons, partnerships and corporations which are not citizens of the United States, to individual resident aliens is not necessary to a decision in this case, and since the Virginia Court might interpret § 28.1-81.1 as applying its denial of licenses only to non-resident alien individuals and all foreign-owned corporations, this Court should not decide the broad constitutional issue of the constitutionality of § 28.1-81.1 as applied individual resident aliens. Should the Court view § 28.1-81.1 as raising issues relating to individuals, the case should be remanded on this point to allow state court interpretation which might avoid the constitutional issue.

ARGUMENT

I.

Federal Statutes Have Not Preempted State Authority To Regulate Commercial Fisheries Within Inland Waters Of The States Or The Three-Mile Marginal Sea

A. The Bartlett Act, 16 U.S.C. § 1081, Has Not Preempted State Authority To Regulate Commercial Fisheries In The Three-Mile Marginal Sea

This Court has repeatedly confirmed the authority of the states to regulate commercial fisheries within their boundaries in the three-mile marginal sea. *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). This authority in the states is limited only by the power exercised by Congress in the regulation of commerce, both foreign

and domestic. In *Manchester* v. *Massachusetts, supra,* it was held:

> "[T]he right to the fisheries and the power to regulate the fisheries on the coasts and in the tide-waters of the State were left, by the Constitution of the United States, with the States, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic." 139 U.S. 240, 258.

Applying these familiar principles, however, the District Court held as to Virginia Code § 28.1-81.1 as follows:

> "In our judgment this legislation (Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. § 1081, *et seq.*) preempted Virginia's control of commercial sea fisheries and superseded the States' regulation of them." (App., p. 20).

The federal enactment which the District Court found preemptive of *all* state regulation of marginal sea fisheries, 16 U.S.C. § 1081, has the very narrow purpose of prohibiting foreign flag vessels (vessels not enrolled under United States enrollment statutes, 46 U.S.C. § 251, *et seq.*) from fishing in the three-mile marginal seas bordering the United States. (See full text of 16 U.S.C. § 1081, App., p. 118). Under the holding of the District Court, however, 16 U.S.C. § 1081 deprives the states of all power to regulate and conserve marginal sea fisheries. Virginia and every other coastal state would, under this interpretation, be powerless to limit fishing seasons, fishing equipment, catch size and a myriad of other factors highly relevant to conservation of fisheries in the marginal sea. In so holding, the lower court runs afoul of the most basic principles of preemption laid down by this Court in *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Kelley* v. *Washington,* 302 U.S. 1 (1937), *Mintz*

v. *Baldwin,* 289 U.S. 346 (1933), *Savage* v. *Jones,* 225 U.S. 501 (1912) and *Reid* v. *Colorado,* 187 U.S. 137 (1902). In *Skiriotes, supra,* it was said:

> "Congress having occupied but a limited field, the authority of the state to protect its interests by additional or supplementary legislation otherwise valid is not impaired." 313 U.S. 69, 75

In short, the enactment of 16 U.S.C. § 1081, which regulates the limited matter of fishing by foreign flag vessels in the marginal sea, cannot be reasonably interpreted as preemptive of all state authority in the regulation of commercial fisheries of the three-mile marginal sea.

B. The Bartlett Act, 16 U.S.C. § 1081, Has Not Preempted Or Superseded Virginia Code § 28.1-81.1

Virginia Code § 28.1-81.1 denies foreign-controlled corporations commercial fishing licenses for use in Virginia waters, including the three-mile marginal sea. Within the class of foreign-owned corporations denied licenses under § 28.1-81.1 are those, like Seacoast, which are foreign-owned but which have acquired United States flag vessels (vessels enrolled under United States enrollment statutes, 46 U.S.C. § 251, *et seq.*) Also within this class of foreign-owned corporations are those which operate foreign flag vessels. The Bartlett Act, 16 U.S.C. § 1081, on its face applies only to foreign flag vessels. It cannot, therefore, be viewed as preempting the operation of Virginia Code § 28.1-81.1 in respect to United States flag vessels operated by foreign-owned corporations. *Savage* v. *Jones,* 225 U.S. 501 (1912); *Reid* v. *Colorado,* 187 U.S. 137 (1902). Seacoast is a foreign-owned corporation operating United States flag vessels. Since the provisions of 16 U.S.C. § 1081 could,

at most, preempt state laws regulating fishing by foreign flag vessels, Seacoast, operating United States flag vessels, cannot possibly claim the benefit of any preemptive effect of 16 U.S.C. § 1081.

Moreover, facial examination of 16 U.S.C. § 1081 and reference to its legislative history make it amply clear that the federal legislation is devoid of any preemptory purpose or effect. Even within the confines of its narrow operation, regulating as it does only foreign flag vessels, 16 U.S.C. § 1081 cannot be said to preempt Virginia Code § 28.1-81.1 as it applies to foreign-owned corporations operating foreign flag vessels. It is true that 16 U.S.C. § 1081 provides that the Secretary of the Treasury may, upon concurrence of other federal officials, permit foreign flag vessels to fish in the three-mile marginal sea. If the federal statute placed unqualified authority in the Secretary to permit such foreign flag vessels to fish it might be argued successfully that 16 U.S.C. § 1081 conflicts with and supersedes any state law prohibiting such foreign flag vessels from fishing. But the authority of the Secretary of the Treasury is conditioned upon the "concurrence of any State, Commonwealth, territory or possession directly affected." The federal statute, containing the above quoted provision requiring state concurrence in any permit authorizing fishing by foreign flag vessels, cannot, therefore be interpreted as preemptive of Virginia's authority to deny licenses to such foreign flag vessels. *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). Put simply, preemption is not to be inferred, but is implied only when the act of Congress, fairly interpreted, is in actual conflict with the law of a state. *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 443 (1960). Far from evidencing any conflict, the federal enactment in question avoids any possible conflict with state laws or interests by requiring state concurrence in any fed-

eral permit authorizing foreign flag vessels to fish in the marginal seas of the state. It can hardly be contended, therefore, that 16 U.S.C. § 1081 was intended to preempt state authority to deny fishing rights to foreign flag vessels within their territorial waters.

While the language of 16 U.S.C. § 1081 itself resolves any question of preemption, further confirmation that preemption was never intended is abundantly evident in the reports of the Senate and House Committees which considered the legislation. The Report of the House Merchant Marine and Fisheries Committee, H.R. Rep. No. 1356, 88th Cong., 2nd Sess., states:

> "It was brought out at the hearings that the powers of the States in dealing with trespassers of their territorial waters would not be preempted by the passage of this bill and for those states already having sanctions, this bill would only supplement existing case law." [2 U.S. Cong. & Admin. News 1964 at 2183.]

Similar was the view of the Senate Commerce Committee. Senate Report No. 500, accompanying S. 1988, 88th Cong., 1st Sess., notes:

> "This bill will not preempt the states of their powers against trespassers of their territorial seas."

As is noted above, however, even if 16 U.S.C. § 1081 were viewed as preempting state laws, it would only preempt state laws respecting foreign flag vessels, since that is the subject matter with which 16 U.S.C. § 1081 deals. Seacoast, a foreign-owned corporation operating United States flag vessels, cannot, therefore benefit by any such federal preemption.

Seacoast, however, contends in its Motion to Affirm that 16 U.S.C. § 1081 must be read not only as a statute which

limits fishing by foreign flag vessels, but as a measure which affirmatively confers rights on all United States vessels to take fish from the waters of the marginal sea. These affirmative rights allegedly conferred upon all United States flag vessels cannot, Seacoast contends, be negated by state licensing laws such as Virginia Code § 28.1-81.1. To ascribe such a purpose to 16 U.S.C. § 1081 is to ignore the language of the statute itself, which deals entirely with regulation of foreign flag vessels. The only reference to United States vessels is included for the obvious purpose of indicating that the provisions of the statute have no application to United States vessels:

> "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States. . ."

Moreover, if the language of the statute itself is not sufficiently clear as to the purpose of the legislation, the above-quoted portions of the House and Senate Committee reports confirm that the sole purpose of 16 U.S.C. § 1081 is to limit fishing by foreign flag vessels, consistent with State laws and interests. There is not a shred of evidence that 16 U.S.C. § 1081 was intended to grant to all United States vessels rights to take fish from territorial waters of the states, notwithstanding state laws which might limit entry into its fisheries of the marginal sea.

C. Federal Statutes Providing For Enrollment And Licensing Of Fishing Vessels Do Not Preempt Or Supersede Virginia Code Sections 28.1-60 And 28.1-81.1

In its Motion to Affirm Seacoast advances the argument that federal enrollment laws, specifically 46 U.S.C. §§ 251, 259, 260, 263, under which vessels are enrolled and licensed

for use in the coasting trade and fisheries, preempt and supersede state law such as those in question here. The contention is that federal enrollment and licensing under 46 U.S.C. § 251 *et seq.* confers upon the owners of the vessels an affirmative right to take fish from the marginal sea or inland waters of every state and that such federal rights cannot be negated by state laws to the contrary. This theory was long ago rejected by this Court in *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). There a Rhode Island citizen, operating a fishing vessel enrolled and licensed under the same federal statute as that relied upon by Seacoast, was convicted of violating a Massachusetts law regulating the type of seines and nets used for taking menhaden in Massachusetts' Buzzard's Bay. In responding to the several contentions of the appellant, among which it was argued that the federal license and enrollment statute conferred a right to fish which could not be negated or limited by state law, the Court held:

> "The principal contentions in this Court on the part of the defendant are that, although Massachusetts, if an independent nation, could have enacted a statute like the one in question . . . yet when she became one of the United States, she surrendered to the federal government her right of control over fisheries of the ocean . . . that fishing upon the high seas is in its nature an integral part of national commerce, and its control and regulation are necessarily vested in Congress and not in the individual States; that Congress has manifested its purpose to take the regulation of coast fisheries . . . by . . . granting the license under which the defendant's steamer was fishing; *and, that, in view of the act of Congress authorizing such license, no statute of a State could defeat the right of the defendant to fish in the high seas under it. . .*
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> * * *

> In *Dunham* v. *Lamphere,* 3 Gray 268, it was held . . . that in the distribution of powers between the federal and State governments, *the right to the fisheries and the power to regulate the fisheries on the coasts and in the tide-waters of the State, were left, by the Constitution of the United States, with the states, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic."* 139 U.S. 240, 254, 255, 258.

The Court then recited with approval the lower court holding that:

> "It had never been decided anywhere that the regulation of the fisheries within the territorial limits of a State was a regulation of commerce." 139 U.S. 240, 259.

And addressing the effect of federal enrollment and licensing the Court said:

> "In *Smith* v. *Maryland,* 18 How. 71, 74, a vessel licensed to be employed in the coasting trade and fisheries, was seized by the sheriff of Anne Arundel County in Maryland, while engaged in dredging for oysters in Chesapeake Bay, in violation of a statute Maryland enacted.
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> * * *
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> The Court . . . held that the act [of Maryland] was not repugnant to the clause of the Constitution which conferred upon Congress the power to regulate commerce, and that *the enrollment and license of the vessel gave to the plaintiff in error no right to violate the statute of Maryland."* 139 U.S. 240, 260, 261

Manchester v. *Massachusetts, supra,* and *Smith* v. *Maryland, supra,* both hold, therefore, that federal enrollment and licensing of fishing vessels does not confer affirmatively

a right to take fish in state territorial waters which right cannot be limited or negated by state fisheries laws. One who operates an enrolled and licensed fishing vessel in state territorial waters is subject to all state laws regulating the taking of fish therein, including laws respecting licensing. Those ineligible for state licenses under a state law otherwise valid cannot, therefore, rely upon the federal enrollment and licensing as authorizing the taking of fish in contravention of the state law's prohibition. *Smith* v. *Maryland, supra; Manchester* v. *Massachusetts, supra.*

Examination of the constitutional basis of the federal enrollment laws confirms the correctness of the above-discussed holdings of this Court that federal enrollment and licensing confers no affirmative right to take fish from the waters of the states. The authority under which the federal enrollment and licensing statutes were enacted is the power of Congress to regulate commerce. *Wiggins Ferry Co.* v. *City of East St. Louis,* 107 U.S. 365 (1882). The power of the Congress over commerce, however, does not extend to the regulation of the taking of fish. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Toomer* v. *Witsell,* 334 U.S. 385 (1948). It, therefore, follows logically that the enrollment and licensing statutes, based entirely upon the power of Congress over commerce, cannot confer any right relating to the taking of fish in state territorial waters.

The fact that federal enrollment of a fishing vessel results in the issuance of a "license" is of little moment. Seacoast urges that issuance of a "license" to a vessel to be used in fisheries constitutes an affirmative grant of the right to participate in any state's fisheries which cannot be negated by contrary state law. The form of this "license," however, as set forth in 46 U.S.C. § 263, and the uses made of the license belie the Appellees' theory that rights to fish

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in state waters are thereby conferred. For example, it is evident that one purpose of the license is to *identify* the intended *use* of the vessel for purposes of federal inspection laws. Vessels are subject to differing inspection laws according to the intended vessel use. This explains the requirement of 46 U.S.C. § 263 that the license indicating use be renewed yearly, while the enrollment certificate is permanent. Fisheries vessels are, in fact, free of federal inspection requirements. 46 U.S.C. § 404. On the other hand, passenger carrying vessels, vessels carrying inflammable liquid cargoes, and sea going barges, are each subject to individually tailored inspection requirements. See 46 U.S.C. §§ 390a, 391a, and 395. Accordingly, federal vessel enrollment and licensing does not amount to an affirmative grant of the right to take fish from Virginia territorial waters, inland or in the marginal sea, in violation of the entry requirements of Virginia laws.

Seacoast's reliance in *Harman* v. *City of Chicago,* 147 U.S. 396 (1893), is, as well, misplaced. In that instance a local law taxed the *navigation* of vessels on the Chicago River. It has always been recognized, since *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), that state laws interfering with *navigation* constituted unlawful impediments to the unrestricted flow of commerce, over which the Congress has paramount and exclusive authority. *Harman* does not, therefore, stand for the proposition, broadly asserted by the Appellees, that no federal license can be negated by state law. *Harman* merely reaffirms *Gibbons'* holding that a federal license authorizing activities that are a part of *commerce* cannot be overriden or impeded by state laws. But commerce and the power of Congress over it has never been construed to extend to the taking of fish in state waters. *Toomer* v. *Witsell,* 334 U.S. 385 (1948); *Manchester* v.

Massachusetts, 139 U.S. 240 (1891). *Harman,* therefore, is of no import in the circumstances of this case. The Virginia statutes in question limit their effect and operation to the taking of fish and in no way regulate navigation or any activity which could be viewed as commerce.

This Court carefully but forcefully limited the holding of *Harman* v. *Chicago, supra,* and similar cases, in *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). In *Huron* this Court upheld the City of Detroit's Smoke Abatement Code as applied to vessels licensed and enrolled under federal statutes and operating in interstate commerce. In rejecting the identical argument made by Seacoast here the Court held:

> "An additional argument is advanced, however, based not upon the mere existence of the federal inspection standards, but upon the fact that the appellant's vessels were actually licensed, 46 U.S.C. § 263, and enrolled, 46 U.S.C. §§ 259-260, by the national government. It is asserted that the vessels have thus been given a dominant federal right to the use of the navigable waters of the United States, free from the local impediment that would be imposed by the Detroit ordinance.
>
> * * *
>
> *The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce."* 362 U.S. 440, 446, 447.

Unless, therefore, a state or local law directly burdens *commerce,* such law is not superseded by the federal enrollment and licensing of a vessel. As was noted previously, the two Virginia laws in question make no attempt to regulate navigation or any incident of commerce. Their sole effect is the

regulation and limitation of the activity of taking fish in state territorial waters, which has never been viewed by this Court as a part of commerce. *Toomer* v. *Witsell,* 334 U.S. 385 (1948). *Huron* thoroughly reviews the legal effect of federal vessel licensing and enrollment as it relates to state laws regulating matters of local concern. The holding of *Huron,* consistent with this Court's previous holdings regarding this issue, effectively and completely disposes of Seacoast's preemption contentions founded upon its status as a federal vessel licensee. Virginia's statutes under review here represent valid state regulation of a purely local matter within the police powers of the state, and as such, are not preempted or superseded by the operation of federal licensing and enrollment statutes.

One final assertion of federal statutory preemption urged by Seacoast can be disposed of without difficulty. It is contended by the Appellees that approval of the transfer or sale of United States licensed and enrolled vessels to Seacoast, a foreign-owned corporation, as required by 46 U.S.C. §§ 808, 835, effectively confers on Seacoast authority to take fish in the waters of every state, state laws to the contrary notwithstanding. This argument reveals the Appellees' complete misunderstanding of the federal statutes regulating enrollment and licensing. The federal statutes relied upon by Seacoast, 46 U.S.C. §§ 808, 835 provide that no vessel already enrolled and licensed under federal statutes (46 U.S.C. §§ 251, 259, 260, 263) may be transferred by any means to corporations controlled by foreign interests unless approved by the Secretary of Commerce. The sum effect of the approval of the Secretary of Commerce, under 46 U.S.C. §§ 808, 835 is federal approval of the transfer of U.S. enrolled vessels to foreign ownership. The transfer of United States enrolled vessels to Seacoast, under 46 U.S.C. §§ 808, 835 cannot be viewed as vesting Seacoast

with any rights to take fish in contravention of Virginia statutes to the contrary.

II.

Virginia Code Section 28.1-81.1 Which Denies Foreign-Owned Corporations Commercial Fishing Licenses Is A Valid Exercise Of State Police Power To Conserve Fisheries And Is Permissible Under The Fourteenth Amendment

Virginia Code § 28.1-81.1 denies commercial fishing licenses to any person, partnership or corporation not a citizen of the United States. The same statute defines corporate citizenship thereunder and applies its denial of licenses to corporations the interest in which is more than twenty-five per cent foreign-owned.

The Appellee, Seacoast, was denied licenses on the basis of the provisions of § 28.1-81.1 which make ineligible foreign-owned corporations. Thus, Seacoast is denied licenses because its controlling interests were owned by Hanson Trust Ltd., a British corporation owned wholly by citizens of the United Kingdom. The Appellees denied licenses here are neither "citizens," *Orient Insurance Company* v. *Daggs,* 172 U.S. 557 (1869), nor are they individual resident aliens. ***The question presented by this appeal, therefore, is not whether any alien may be denied a license but whether foreign-owned corporations may legitimately be denied these licenses.***

The decisions of this Court in *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), *In re Griffiths,* 413 U.S. 717 (1973) and *Graham* v. *Richardson,* 403 U.S. 365 (1971) are inapposite to the problems raised in this appeal. In each of the aforementioned cases this Court addressed the issue of the validity of state laws excluding *individual resident aliens* from rights or privileges afforded United States citizens. Only in the context of discrimination against *individual resident*

aliens has the majority of this Court applied a "compelling state interest" standard of review under the Fourteenth Amendment. See *Sugarman, supra; In re Griffiths, supra; Graham, supra.* That higher standard of review is not demanded here, where the Appellees are foreign-owned corporate entities. Instead, traditional principles of equal protection applicable to state laws regulating economic and business activities may be applied to this appeal. Under traditional standards a state law regulating economic and business activities is adjudged valid against the Equal Protection Clause if it has *some reasonable basis, Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970), or *some reasonable set of facts may be conceived to justify it. McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961).

There is ample justification for reviewing this case under traditional equal protection standards. It is the individual resident alien who, under the Constitution, resembles the citizen. *In re Griffiths,* 413 U.S. 717, 722 (1973). The protections and presumptions which may logically emanate from federal imigration and naturalization processes do not have application or afford rationale for extending similar protection to foreign-owned corporate entities. The rationale which may have force in equating individual resident aliens with United States citizens so as to require close judicial scrutiny of a classification based on alienage does not apply in this case.

Applying traditional equal protection standards the Virginia statute in question must be upheld as a valid exercise of the state police power in conserving valuable but limited fisheries resources. Experience in fisheries management has revealed that native fishermen have a significantly greater self-interest in conservation of fisheries stocks. The characteristic fishing practice of foreign fishing interests has been over-fishing and rapid depletion of stocks, after which the

foreign interests depart for other more abundant stocks. Over-fishing in one year by foreign fishing interests does not imperil next season's potential harvest or income as it will with native fisherman. These facts have been thoroughly documented in hearings before Congressional committees considering the federal legislation extending the United States fishery zone. The findings of those hearings preface the newly enacted United States two-hundred mile fisheries limit, Public Law 94-265.[3]

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[3] (a) Findings—The Congress finds and declares the following:

(1) The fish off the coasts of the United States constitutes valuable and renewable natural resources.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the over-fishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the over-fishing of these valuable fisheries resources. There is danger that irreversible effects from over-fishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before over-fishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

Publ. L. No. 94-265, 90 Stat. 331, § 2(a).

The Virginia Statute was not, however, a response to the general experience of the nation only. Virginia commercial fisheries have experienced directly the economic effects of foreign fishing tactics. The river herring industry, stable and productive in Virginia for over one-hundred years, was economically destroyed in a period of a few short years as a result of foreign off-shore activities. In the late 1960's Virginia began to experience rapid depletions of river herring after foreign fleets began fishing off our coasts in 1966. Federal agreements and enforcement efforts were ineffective in curbing the rapid decline of the stocks even after state fisheries experts and industry representatives reflected the drastic effects of the foreign effort. This fact highlights the need for voluntary compliance based on self-interest. Today there is no economically viable river herring fishery in Virginia. The effect of foreign effort has, therefore, been very pointedly demonstrated to Virginia fisheries management officials and the commercial fishing industry as well. Agreements, regulations, laws and enforcement techniques aimed at conservation notwithstanding, foreign fishing practices are devastating in their effect. In short, voluntary compliance and self-interest in preservation of the resource is absolutely essential to maintenance of the fragile balance between economic benefits derived from fisheries resources and preservation of the resource itself.

Statistics compiled by the Department of Commerce, National Marine Fisheries Service, further underline the results of foreign effort in American coastal fisheries. (See Dep. James E. Douglas, Jr., App., pp. 46-47). The direct relationship in time between commencement of foreign fleet effort against a particular fishery and the rapid American catch declines cannot be viewed as conicidental. (Dep. James E. Douglas, Jr., App., pp. 48-49). Nor can the catch

statistics be ignored as insignificant, the declines in some species amounting to as much as eighty-five percent over a ten year period. (Dep. James E. Douglas, Jr., App., pp. 46-47).

Given the documented depradations of fishery stocks by foreign fishing interests, what possible danger can they present to Virginia and other states which would justify passage of statutes like Virginia Code § 28.1-81.1? Seacoast hastens to note in its Motion to Affirm that federal law, namely 16 U.S.C. § 1081, already prohibits foreign flag vessels from entering state territorial waters of the three-mile marginal sea. Foreign flag vessels, it is urged, are allowed to fish within the next nine miles from the American coast only at the sufferance of the federal government, and then under whatever regulations the government deems necessary. Thus, Seacoast argues, the states need no further protection by laws such as the Virginia law in question here. Such short-sighted views, however, will not bear scrutiny.

First, until Congress enacted the recent legislation extending the United States fishery zone from twelve to two-hundred miles, foreign flag vessels could fish in waters off the American coast, outside of twelve miles, with complete impunity and free of regulation. Now foreign fleets face a two-hundred mile zone, the first three miles of which they cannot enter, and one-hundred ninety-seven miles in which they can fish only with United States consent and subject to federal regulation. The motivation to avoid the loss of unregulated access to such a vast coastal area will undoubtedly be intense. To avoid the new regulation foreign fisheries companies will be likely to seek ways to operate United States flag vessels, thereby gaining access to unrestricted fishing between three-miles and two-hundred miles, which

is denied foreign flag vessels. If foreign companies can enroll and license vessels under United States law, and meet, as well, state license requirements, they can have access to all American fisheries, including the three-mile state marginal seas and state inland waters. To meet present federal enrollment requirements all that is required is that the vessel to be enrolled be (1) American built and (2) owned by a corporate entity domiciled in any of the United States. 46 U.S.C. §§ 251, 252, 11. (The requirement of 46 U.S.C. § 11 that vessels to be enrolled be owned "wholly" by U.S. citizens, as applied to corporation-owned vessels, requires in the present view of the United States Coast Guard, that the corporation be domiciled in any of the United States.) Enrollment takes no account of the nationality or citizenship of the vessel-owning corporation's owners who, of course, determine corporate policy and fishing practices. Thus, a foreign controlled corporation need only establish a shell corporate structure in any state and purchase American-built vessels in order to enroll them as United States vessels eligible to fish on equal footing with United States fishing interests in the zone between three and two hundred miles. Furthermore, to be eligible for state fisheries in the three-mile marginal sea and state inland waters even the most stringent state licensing statutes require only that corporate licensees be domiciled in the state. This was the situation in Virginia before passage of § 28.1-81.1. Accordingly, a foreign-owned shell corporation with American-built vessels could readily gain entry to the fishery of the state in which it was located or domiciled and the entire United States zone between three and two-hundred miles, free of regulation applicable to foreign flag vessels. Yet such a foreign-controlled shell corporation might practice depradations equal to those of any foreign flag fishing interest.

It is this very danger which Virginia Code § 28.1-81.1 envisions and seeks to prevent by denying licenses to foreign-controlled corporations on the basis of the citizenship of the owners of the corporation, irrespective of the domicile of some corporate shell.

It is widely recognized among those experienced in fisheries management that fisheries conservation regulations cannot be effective without voluntary compliance founded upon self-interest in preservation of stocks. (Dep. James E. Douglas, Jr., App., p. 69). The Congress recognized this fact in its findings supporting extension of the United States fisheries zone, noting that conservation measures in international fisheries agreements had been ineffective in conserving stocks against determined foreign over-fishing practices. infra., pp. 25-26. It cannot, with these facts in mind, be gainsaid that Virginia's enactment of § 28.1-81.1 is without reasonable relation to the clearly permissible purpose of fisheries preservation. Accordingly, § 28.1-81.1 must be viewed as a valid exercise of state police powers permissible under the Equal Protection Clause of the Fourteenth Amendment. *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 365 (1970).

There is, however, further reason for this Court to uphold the validity of the challenged statute. This Court has in many cases validated state laws which treated citizens and aliens, even resident aliens, differently. With respect to ownership of real property, *Terrace* v. *Thompson,* 263 U.S. 197 (1923), *Porterfield* v. *Webb,* 263 U.S. 225 (1923), the devolution of real property, *Blythe* v. *Hinckley,* 180 U.S. 333 (1901), *Hauenstein* v. *Lynham,* 100 U.S. 483 (1880), and preservation of wild game, *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914), this Court has recognized sufficient proprietary interests vested in the states to justify,

without further rationale, distinctions based on alienage. *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914) provides adequate precedent for upholding state laws like § 28.1-81.1, reserving fisheries or game resources of a state to United States citizens. In these cases this Court recognized the right of the states to determine that property held in trust for the citizens of the state could be reserved for use by U.S. citizens exclusively.

While this Court departed from the above-outlined rationale in *Takahashi* v. *Fish Comm'n.,* 334 U.S. 410 (1948), that holding was occasioned by the racial overtones of the questioned statute and the Court's uncertainty of state ownership of marginal sea fisheries. The statute of Virginia in question here is untainted by racial motives and the uncertainty as to state ownership and interest in marginal sea fisheries has been resolved conclusively in favor of the states by the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*

Whatever inroads may have been made to undermine the validity of the proprietary interest doctrine in other contexts, *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), *In re Griffiths,* 413 U.S. 365 (1971), the doctrine has never been rejected in the context of state laws respecting conservation of valuable natural resources. *Truax* v. *Raich,* 239 U.S. 33 (1915). Moreover, if its rejection is appropriate in this context it would more clearly be so in respect to distinctions made which flatly discriminate against individual resident aliens as contrasted with those state classifications, like the present one, which are aimed at foreign-owned corporate entities, lacking the benefits of presumptions flowing from federal immigration and naturalization processes, which have prompted the Courts to view them on equal terms with United States citizens.

III.

Virginia Code Section 28.1-60 Which Restricts Menhaden Fishing In The Chesapeake Bay To Virginia Residents Is A Valid Exercise Of State Police Power To Conserve Fisheries Resources And Is Permissible Under The Fourteenth Amendment

Pursuant to Virginia Code § 28.1-60 Virginia's Chesapeake Bay menhaden fishery is open only to Virginia resident persons, firms and corporations. Placing reliance in *Takahashi* v. *Fish Comm'n.,* 334 U.S. 410 (1948), the lower court held the statute to be violative of the Equal Protection Clause of the Fourteenth Amendment. (App., p. 19). It is, at once, apparent that the District Court reliance upon *Takahashi* was improper. *Takahashi* involved a state measure which denied fishing licenses to persons "ineligible to citizenship," thereby establishing a classification based in *alienage* and *race.* 334 U.S. 412. This Court noted very pointedly that under circumstances of that type of classification the state had narrow limits in its discretion. 334 U.S. 412. But in the present case, the Virginia statute under scrutiny involves a *residency* classification for purposes of regulating an economic resource of the state. In these circumstances it is amply clear that traditional standards of equal protection are applicable, thereby allowing the state much broader latitude in its regulation. *Toomer* v. *Witsell,* 334 U.S. 385, 396 (1948). Under traditional principles of equal protection, therefore, a state law must be upheld if it can be justified upon any reasonable factual basis which may be conceived to underlie the law. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The close judicial scrutiny which may be appropriate where the classification is "suspect," *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964), or where the operation of the classification denigrates basic constitutional rights, *Shapiro* v. *Thompson,*

394 U.S. 618 (1969), is not applicable to this statute. *San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 40 (1973). The District Court, therefore, improperly applied more stringent standards in reviewing Virginia Code § 28.1-60 than the Equal Protection Clause demands.

Applying traditional equal protection standards, § 28.1-60 does have a reasonable basis justifying its exclusion of non-residents. The Chesapeake Bay menhaden fishery is the chief and most valuable Virginia fishery. But it is, likewise a fragile fishery. The Chesapeake Bay serves particularly well as a nursery for newly spawned menhaden who enter the Bay in early spring and remain there in protected waters for at least some ten or eleven months of their first year. (Dep. W. Jackson Davies, App., p. 74 and Dep. Robert B. Chapoton, App., p. 95). Young menhaden are fragile in that they are less migratory and less able, therefore, to escape non-conservationist fishing practices. Virginia, unlike many other states, regulates by statute net mesh size for taking of menhaden in an effort to nurture the valuable fishery and protect it from over-fishing of the young small fish. See Virginia Code § 28.1-65.

Enforcement of any conservation measure, particularly net mesh size regulations and similar measures, is not without practical problems. Vessel boardings by state inspectors while fishing activities are underway are disruptive to fishing procedures, costly to the state in that it requires increased numbers of enforcement vessels and inspectors, and are generally inefficient due to the relative mobility of fishing vessels, which enables them to avoid enforcement on the waters. Dockside inspection is clearly preferable and more efficient. Non-resident menhaden vessels, however, would enter the Bay, fish, and leave without docking in Virginia ports in the majority of cases. As a practical matter, then, net size enforcement, the vital link in this fishery's conservation, is virtually unenforceable as to non-resident fishing vessels.

Moreover, it is recognized by fisheries management experts that voluntary compliance is a key factor in any fisheries conservation approach. (Dep. James E. Douglas, Jr., App., p. 69) Non-residents are less likely to offer voluntary compliance with enforcement measures, lacking, as they naturally would, the self-interest in preservation which motivates residents, who must depend upon a renewable resource for their livelihood. These considerations, when taken into account, must certainly be viewed as rational justification for Virginia's restriction against non-residents in the Chesapeake Bay menhaden fishery. Under principles established by this Court in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 365 (1970), and *San Antonio School District* v. *Rodriquez,* 413 U.S. 1 (1973), the provisions of Virginia Code § 28.1-60 must be upheld against Seacoast's equal protection challenge.

Toomer v. *Witsell,* 334 U.S. 385 (1948), relied upon heavily by Seacoast, is not dispositive of this case. First, and foremost, the virtual exclusion of non-residents in *Toomer* was not justified on the grounds that non-residents represented the source of any particular evil or threat to conservation of fish. As this Court noted, 334 U.S. 385, 397, 398:

> "As justification for the statute, Appellees urge that the State's obvious purpose was to conserve shrimp supply, and they suggest that it was designed to head off an impending threat of excessive trawling. The record casts some doubt on these statements. But in any event, Appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which, as indicated above,

> is to outlaw *classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."*

In *Toomer,* then, there is a clear indication that state residency requirements will be upheld where a peculiar evil can be attributed to non-residents. The unenforceability, against non-residents, of Virginia's hief conservation tool in the Chesapeake Bay menhaden fishery does offer reasonable justification for the exclusion of non-residents. It is, furthermore, noteworthy that in *Toomer,* South Carolina had no conservation laws other than the non-residency provision, while Virginia has demonstrated through legislation a conservation effort apart from its exclusion of non-residents.

Additional justification for upholding Virginia's Chesapeake Bay menhaden residency requirement is found in this Court's holding in *McCready* v. *Virginia,* 94 U.S. 391 (1877). There, the vital interests of the states in domestic fisheries resources was recognized as justifying exclusion of non-residents. As was the case in *McCready,* the fisheries resources requiring protection are located in the State's inland waters. This Court's decision in *Toomer* v. *Witsell,* 334 U.S. 385 (1948) does not overrule *McCready* nor does it now offer reason to reject the applicability of the *McCready* holding here. *Toomer* failed to follow *McCready* for two reasons: (1) the fisheries there involved were located in coastal waters in the marginal sea, the ownership of which were unsettled in 1948, and (2) the shrimp fishery of the coastal waters were highly migratory by nature, which factor the Court found cast doubt upon state ownership.

As noted previously, the Chesapeake Bay menhaden fishery is an inland water fishery, distinguishable immediately

from the coastal shrimp fishery in *Toomer.* There has never been any question that the states own the waters and beds of their inland waters. As to the migratory character of the fish involved, Chesapeake Bay menhaden are, because of their relative youth, far less mobile in ranging the coast than are menhaden in other parts of the United States. (Dep. Robert B. Chapoton, App., p. 110). In fact, in some portion of the Bay menhaden never leave the Bay during their first year, but instead, over-winter there. (Dep. Robert B. Chapoton, App., p. 101). In addition, it is an important fact that when Chesapeake Bay menhaden are subject to fishing effort (a season of some six months) they are a relatively stable localized resource. It is abundantly clear that the Chesapeake Bay menhaden industry fishing effort does not involve navigation up and down the coast pursuing highly migratory fish. Instead, menhaden are found in dense schools which remain within the Bay which affords protection from open seas necessary for nursery stocks and the younger fish. The life habits of Chesapeake menhaden, therefore, reveal that they are localized sufficiently to be viewed as the property of Virginia.

The factors which may have persuaded the Court to reject the important state interest recognized in *McCready* are, then, not present in this case.

It is also clear that since *Toomer* the Congress, by enactment of the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.,* has conferred on the states title to *all* fisheries resources within their boundaries out to three miles, irrespective of whether such fish are migratory.

Whether *McCready* is alone viewed as offering satisfactory rationale for the defense of the Virginia statute under review here, the importance of the states' interests in their natural resources is highlighted by that decision. Virginia

has no less vital interest in the menhaden fishery of the Chesapeake Bay. Having recognized that interest and the fragile balance required to maintain that interest the demonstrated inability of the state to enforce necessary conservation measures against non-resident fishermen clearly constitutes lawful justification for the residency classification made by Virginia Code § 28.1-60. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

IV.

Neither Virginia Code Section 28.1-60 Nor Section 28.1-81.1 Interferes With Or Unduly Burdens Interstate Commerce

Virginia Code sections 28.1-60 and 28.1-81.1 are designed to regulate eligibility for licenses to take fish in Virginia's waters. Concerned only with the "taking of fish," these statutes do not attempt to regulate navigational activities of fishing vessels, nor do they restrict the movement of fish out of the State after they are taken.

This Court has consistently held that the "taking of fish" in state waters constitutes a purely "local activity" which is not a part of commerce among the states. *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), *Toomer* v. *Witsell,* 334 U.S. 385 (1948). The taking of fish in state waters has, therefore, long been viewed as a matter appropriate for state police power regulation. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *McCready* v. *Virginia,* 94 U.S. 391 (1877).

Seacoast would have this Court apply the holdings in *H. P. Hood and Sons, Inc.,* v. *Du Mond,* 336 U.S. 525 (1949), *Baldwin* v. *Seelig,* 294 U.S. 511 (1935), and *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928), to find the Virginia laws here in question violative of the limitations imposed by the commerce clause. It is at once

apparent that the holdings in those cases are not even remotely applicable to the laws involved here. As this Court noted in *H. P. Hood and Sons., Inc.,* v. *DuMond,* at 336 U.S. 525, 535:

> "This Court consistently has rebuffed attempts of states to advance their own commercial interests *by curtailing the movement of articles of commerce, either into or out of the state,* while generally supporting their right to impose even burdensome regulations in the interest of local health and safety."

It was the state restriction upon *movement of articles of commerce into or out of the state* which was found unconstitutional in *Foster-Fountain Packing Co.* v. *Haydel, H. P. Hood and Sons, Inc.* v. *DuMond,* and *Baldwin* v. *Seelig.* Virginia has not by its licensing statutes in any manner, directly or indirectly, attempted to impede the free flow of fish taken in Virginia out of the state.

In point here is this Court's holding in *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422 (1936) wherein it considered commerce clause objections to a California law regulating manufacture, canning and packing of sardines:

> "There is nothing in the state act to suggest a purpose to interfere with interstate commerce. It in no way limits or regulates or attempts to limit or regulate the movement of sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the State. Its direct operation, intended and actual, is wholly local. 297 U.S. 422, 425, 426.

As this Court's holding in *Toomer* v. *Witsell,* 334 U.S. 385 (1948) made clear the commerce clause objection raises two essential inquiries: (1) is the activity regulated a part of interstate commerce; and (2) does the state's law unduly burden interstate commerce:

> "Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce in shrimp, and the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." 334 U.S. 385, 394, 395.

As in *Toomer,* here the regulated activity is the taking of fish, a local activity, and the regulation involved in no way discriminates against interstate commerce in fish or fish products.

The broad latitude states frequently require in effectively managing their natural resources has historically been recognized by this Court in turning back commerce clause objections to state legislation. *Silz* v. *Hesterberg,* 211 U.S. 31 (1908), *Geer* v. *Connecticut,* 161 U.S. 519 (1896). In certain instances it has been adjudged that states have so great an interest in preserving their resources as to allow state restrictions which directly impinge on the free flow of commerce. *Geer, supra.*

The Virginia licensing statutes directed at conservation of valuable fisheries, and free of any restriction upon any activity which can be legitimately called a part of commerce, must, therefore, be upheld as imposing no unconstitutional burden upon interstate commerce.

V.

The Lower Court Should Have Abstained From Interference In State Domestic Fisheries Management, Where The Questioned Statutes Infringe Upon No Sensitive Constitutional Guarantees And Interpretation Of The Statutes By State Courts Might Avoid Broad Constitutional Issues

The federal courts have customarily abstained from interference in the administration of state domestic programs, particularly where no basic constitutional guarantee is

jeopardized by enforcement of the state laws questioned. *Alabama Public Service Commission* v. *Southern Rwy. Co.,* 341 U.S. 341 (1951). *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943), and *Great Lakes Dredge Co.* v. *Huffman,* 319 U.S. 293 (1943). Fisheries management has been recognized as a matter of local concern within the police powers of the states, requiring state legislation tailored to the needs of the particular fishery. *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). This Court recognized the wisdom in abstaining from interference in state fisheries licensing controversies in *Reetz* v. *Bozanich,* 397 U.S. 82 (1970), noting that local fisheries are "a unique resource, the management of which is a matter of great state concern," and that state court interpretation of a state constitutional provision might "conceivably avoid" the federal constitutional issues involved.

Seacoast, denied licenses under provisions of Virginia Code § 28.1-81.1, because it is a foreign-controlled corporate entity, has broadly challenged the aforementioned statute as an alienage classification, deserving strict judicial scrutiny, under authority of recent decisions of this Court.[4]

Should the Court, however, view the present controversy as raising a broader constitutional issue, namely, the possible unconstitutionality of restrictions on the rights of individuals by § 28.1-81.1, the case should be remanded on this point to allow an authoritative construction of the applicable statute by the Supreme Court of Virginia. For it is clear that such an interpretation by the Virginia Court could eliminate the broad constitutional issue regarding individual resident aliens. The Virginia Court would be required to

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[4] *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), *In re Griffiths,* 413 U.S. 717 (1973), *Graham* v. *Richardson,* 403 U.S. 365 (1971), holding that alienage classifications applied to *individual resident aliens* require close judicial scrutiny.

examine the statutory language in light of this Court's recent decisions tending to place individual resident aliens on equal footing, substantially, with United States citizens. *Sugarman* v. *Dougall,* 413 U.S. 634 (1973). Thus, as related to individuals, the Virginia Court might reasonably view the statute as denying licenses to only non-resident individual aliens. Such an interpretation would render individual resident aliens eligible for licenses as United States citizens, thereby avoiding the constitutional question raised here by Seacoast. That such an interpretation by the Virginia Court is "conceivable" is undeniable. *Reetz* v. *Bozanich,* 397 U.S. 82 (1970). Further, in light of the overriding purpose of the statute, to reach foreign-owned corporations, and this Court's protection of resident aliens, such an interpretation is not at all unlikely. Abstention in these circumstances is proper. *Railroad Comm'n.* v. *Pullman,* 312 U.S. 396 (1941).

In view of the unique local problems associated with fisheries management, a traditionally local matter, the absence of infringement of sensitive constitutional guarantees, and the possibility of avoiding broad constitutional issues through state court review, the lower court should have exercised its judicial discretion to abstain from deciding this case.

CONCLUSION

Neither the Bartlett Act, 16 U.S.C. § 1081 *et seq.,* nor the federal vessel enrollment and licensing statutes preempt the power of the respective states to regulate and license commercial fisheries in their inland waters or their three-mile marginal seas.

Neither Virginia Code § 28.1-81.1, preventing issuance of commercial fishing licenses to foreign-owned corporations, nor Virginia Code § 28.1-60, restricting menhaden fishing in the Chesapeake Bay to Virginia residents, violates the Equal Protection Clause of the Fourteenth Amendment.

Neither Virginia Code § 28.1-81.1 nor Virginia Code § 28.1-60 interferes with or unduly burdens interstate commerce in violation of Article I, § 8 of the United States Constitution.

The District Court should have abstained from interference in state administration of domestic fisheries regulations where such state regulation does not impinge upon any sensitive constitutional right and where state court interpretation might void broad constitutional issues.

For the foregoing reasons the judgment of the United States District Court for the Eastern District of Virginia should be reversed.

Respectfully submitted,

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I, Anthony F. Troy, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for James E. Douglas, Jr., in the above-captioned matter, hereby certify that three (3) copies of this Brief have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 30th day of June, 1976, as follows:

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

James E. Douglas, Jr.,

Appellant,

v.

Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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Opinion of the Court Below

The order and opinion of the three-judge District Court below are not yet reported. The order and opinion are set forth in the Appendix, at pages 14 and 16, respectively.

Jurisdiction

A three-judge District Court convened under 28 U.S.C. § 2284, in the Eastern District of Virginia, held two Virginia statutes were unconstitutional. Jurisdiction here by appeal is based on 28 U.S.C. § 1253. This Court noted probable jurisdiction on April 26, 1976.

Statutes Involved

The text of the statutes involved which were determined to be unconstitutional is set forth in the Appendix, at pp. 114-118. Section 28.1-60 of the Code of Virginia (1950), as

amended, in essence prohibits nonresidents of Virginia from catching menhaden in the Virginia portion of Chesapeake Bay. Section 28.1-81.1 prohibits aliens, including alien-owned U.S. corporations, from obtaining a license to catch menhaden in Virginia. Violation of either statute is a misdemeanor.

The provisions of the United States Constitution involved are the Commerce Clause, Article I, § 8, cl. 3, the Supremacy Clause, Article VI, ¶ 2 and the Equal Protection Clause, Amendment XIV, § 1.

QUESTIONS PRESENTED

1. Whether U.S. enrollment and licensing of menhaden fishing vessels by domestic corporations ultimately owned by non-U.S. citizens, after approval by the Department of Commerce, can be nullified by state laws designed to exclude nonresidents and noncitizens from competing with locally based fishermen?

2. Whether corporations incorporated and resident in states outside the State of Virginia, ultimately owned by non-U.S. citizens, the vessels of which are duly enrolled and licensed in the U.S. fishery following a hearing and approval by the Department of Commerce, are deprived of the equal protection of the laws within the Fourteenth Amendment by exclusionary Virginia statutes which bar nonresidents and foreign-owned corporations from fishing for menhaden in Virginia waters?

3. Whether the attempts of the State of Virginia to exclude nonresidents from the menhaden fishery of Chesapeake Bay and exclude noncitizens from the menhaden fishery of the Bay and Virginia's marginal seas constitute an unlawful burden on interstate commerce?

4. Whether the Federal doctrine of abstention is applicable where state statutes challenged as unconstitutional admit of no saving construction by state courts and the enforcement thereof would cause immediate and irreparable injury?

STATEMENT OF THE CASE

On July 14, 1975 the Appellees filed a Complaint requesting a three-judge court to declare §§ 28.1-60 and 28.1-81.1, CODE OF VIRGINIA (1950), as amended, unconstitutional and to enjoin enforcement of said statutes. Section 28.1-60 prohibits nonresident corporations such as the Appellees from catching menhaden in the Virginia portion of the Chesapeake Bay. Section 28.1-81.1 prohibits aliens, including alien owned U.S. corporations, such as the Appellees, from obtaining a license to catch menhaden anywhere in Virginia waters. After completion of depositions by both sides and following the submission of factual affidavits and briefs to the extent desired by the parties, the District Court granted Appellees' Motion for Summary Judgment on November 7, 1975 finding both statutes to be unconstitutional and enjoined their further enforcement.

The Appellant, James E. Douglas, Jr., is the Commissioner of Marine Resources for the Commonwealth of Virginia and is charged with responsibility for enforcement of Virginia's statutes regulating commercial fisheries. Section 28.1-13, CODE OF VIRGINIA (1950), as amended.

Appellees are Seacoast Products, Inc. ("Seacoast"), a Delaware corporation duly qualified to do business in the State of Virginia, and its subsidiaries, The New Smith Meal Company, Inc. ("Smith Meal"), a Massachusetts corporation, and Second Oceanic Corporation ("Oceanic"), a New York corporation. Appellees are engaged solely in the business of fishing for menhaden and processing the catch for commercial purposes. Appellees' operations should not be confused with those of foreign fishing fleets not within the jurisdiction of the United States. Ultimate alien stock ownership of Seacoast in no way affects its obligations under laws of the United States and of the various states where it conducts its business.

The operations of Seacoast were begun in Port Monmouth, New Jersey in 1911 by J. Howard Smith. After his

death in the early 1950's, ownership of the business passed to his children and a son-in-law ("Smith Family"). The stock of Seacoast was sold by the Smith Family in December 1973 to a Delaware corporation ultimately owned by Hanson Trust Ltd., a publicly held company of the United Kingdom.

The transfer of ownership of Seacoast from the Smith Family resulted in no change in Seacoast's mode of operations. The officers and crews of its ships are U.S. citizens, as are 95% of the employees in its processing plants in various coastal states (App. 29).

Approval of Seacoast Transfer by the United States Government

The purchase of the Seacoast stock by the British-controlled Delaware corporation required the approval of the Maritime Administration of the Department of Commerce under Section 37(e)* of the Shipping Act, 1916, 46 U.S.C. § 835(e). Seacoast's and Smith Meal's menhaden fishing vessels were temporarily transferred to a nominee, Richard Reiss, a citizen of the United States pending the outcome of proceedings in the Department of Commerce on Seacoast's application to retransfer the vessels from Reiss to Seacoast and Smith Meal under Sections 9 and 37 of the Shipping Act, 1916 (46 U.S.C. §§ 808, 835).

The application for approval was submitted in January of 1974. The application clearly proposed that the vessels would be redocumented (by enrollment and licensing) as fishing vessels under the laws of the United States.

In passing upon the application, the Maritime Administration considered, among other things, the acceptability of the foreign purchaser and national defense considerations. The application proposed continued operation of the vessels under the U.S. flag. Because the application involved continued operation by an alien controlled domestic corporation, it was forwarded, pursuant to Maritime Admin-

* Section 37 applies during a period of national emergency, and therefore has been applicable since the PRESIDENTIAL PROCLAMATION No. 2914 of December 16, 1950, 15 Fed. Reg. 9029 (1950).

istration policy, to the National Oceanic and Atmospheric Administration ("NOAA") for investigation and comment.

NOAA's policy in regard to such transfers was set forth in a public statement dated October 16, 1973, 38 Fed. Reg. 29239-40 (1973),* and provides in part as follows:

> "Under present law aliens may own controlling interests in U.S. fishing companies operating U.S.-documented fishing vessels. Ownership and control of a U.S. company by foreign interests does not alter the fact that any such company is still a U.S. company and as such is subject to all U.S. laws and regulations. Consequently, the provisions of law relating to, among other things, employment and compensation of alien workers, exports and imports of products, operations of U.S.-documented fishing vessels, international agreements to which the U.S. is a party, and fishing regulations would apply to foreign-owned U.S. fishing companies.
>
> • • •
>
> NOAA will investigate and evaluate each application on its individual merits with consideration being given to, among other things, the impact of the proposed transaction on (a) conservation and management of the fisheries resources, (b) the employment of U.S. citizens, (c) U.S. consumers, (d) competition, and (e) other social and economic factors. In doing this, NOAA will review and evaluate the operational plans of the company as well as the extent of foreign investment in the particular fishery in which the company plans to operate."

After widespread public notice, public hearings on the Seacoast application were held on March 20-21, 1974 and covered the subjects with which NOAA was particularly

* The policy in effect at that time was an interim policy. A final policy, reiterating in greater detail the same considerations set forth in the interim policy, was issued September 13, 1974. 39 Fed. Reg. 33812-3 (1974).

concerned, as set forth in its policy statement, above. At the outset of the hearings, the Chairman outlined the purpose and format of the proceedings:

> "As I previously indicated, the focus of this hearing will be on the fishery aspects of the proposed transfer.
>
> We will further address such considerations as the possible effects of the transfer upon (1) the Menhaden resource involved; (2) the aggregate of fishing/processing companies on whose behalf the transfer is sought; (3) upon the Menhaden segment of the commercial fishing industry; and (4) upon consumers of fish meal, fish oil, and fish solubles which these companies have produced." (App. 31)

During the hearings, statements were offered in support of the application by various representatives of Seacoast. Its primary competitors, Zapata-Haynie Corporation ("Zapata") and Standard Products, Inc. ("Standard"), opposed the application. The hearings on the application to retransfer the menhaden fishing vessels to Seacoast and Smith Meal resulted in a favorable recommendation by NOAA to the Maritime Administration. NOAA necessarily concluded in making its recommendation that the application was consistent both with protection of the fisheries, one of its paramount concerns, and also with the United States' social and economic interests, including the effect on competition.

The Department of Commerce (through the Maritime Administration) granted the application for transfer of the vessels to Seacoast and Smith Meal and their redocumentation as United States fishing vessels, and issued Transfer Orders approving such transfers. The Department in such circumstances is authorized by law, if it grants such approval, to grant it "either absolutely or upon such conditions as the Secretary prescribes." 46 U.S.C. § 839. The approval was granted *unconditionally*.

After the Department of Commerce issued its Transfer Orders, the vessels were redocumented (by enrollment and licensing) as fishing vessels of the United States.

Upon enrollment, they were "deemed vessels of the United States entitled to the privileges of vessels employed

in the . . . fisheries." 46 U.S.C. § 251(a). As such vessels of the United States, they were entitled to "engage in the fisheries within the territorial waters of the United States." 16 U.S.C. § 1081.

Commercial Menhaden Fishing in the United States

Menhaden is a commercially valuable species of inedible fin fish. (App. 24) It is the leading species of fish caught for industrial use and, in terms of landed tonnage, the menhaden industry is the largest fishery in the United States. The catch of menhaden is processed into fish meal, fish oil and fish solubles. Fish meal is used primarily for poultry feed; fish solubles for animal feeds. Fish oil is used domestically for industrial purposes and also is exported to Europe and Canada where its use in the manufacture of margarine is permissible. Fish meal is also used by pharmaceutical companies in the manufacture of antibiotics. (App. 24)

Menhaden are migratory finfish.* The harvest of menhaden is comprised mostly of stocks that have migrated

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* The migratory nature of menhaden along the Atlantic coast was discussed as early as 1877. See UNITED STATES COMMISSION OF FISH AND FISHERIES, REPORT OF COMMISSIONER FOR 1877, APPENDIX A, *The Natural and Economical History of the American Menhaden*, at 39, which states in part as follows:

> "At the approach of settled warm weather the schools make their appearance in the coast waters. They remain in the bays and near the shores until they are warned away by the breath of coming winter. The date of their appearance is earlier in the more southern waters, and the length of their sojourn longer. . . . There is always a balance in favor of earlier arrivals at the more southern localities. Thus, it becomes apparent that the first schools appear in Chesapeake Bay in March and April, on the coast of New Jersey in April and early May, and on the south coast of New England in late April and May, off Cape Ann about the middle of May, and in the Gulf of Maine about the latter part of May and the first of June. Returning they leave Maine in late September and October, Massachusetts in October, November, and December, Chesapeake Bay in December, and Cape Hatteras in January."

See also the depositions of experts in this case (testimony of Dr. W. Jackson Davis, Assistant Director of the Virginia Institute of Marine Science, App. 75-83, and Robert Chapoton, a specialist in menhaden research employed by the National Marine Fishery Service, App. 93-99).

across the waters of the coastal states. (App. 32) Female menhaden begin their reproductive period at age three. (App. 98) The newly spawned menhaden swim to estuaries along the nearest coastal waters of the Atlantic seaboard from the Florida coast to Maine. (App. 87, 94) Thus, depending on the area where they are spawned, the young fish enter estuaries of the South Atlantic States, or the Middle Atlantic States including Chesapeake Bay, or the North Atlantic States. (App. 94)

Menhaden spend most of their life cycle close to shore although they generally spend the winter months in deep water off the South Atlantic coast from Cape Hatteras to Florida. (App. 32) Many juvenile menhaden travel south prior to their first winter,* although there is believed to be some overwintering by young fish in the estuaries they first entered. (App. 74-75, 95) Such overwintering is more frequent in estuaries in coastal states south of Virginia than in Chesapeake Bay and less frequent in estuaries north thereof. (App. 88, 102)

In March of each year menhaden begin a northern migratory movement travelling in inshore waters in large, tightly packed schools. The younger fish do not travel as far north as the oldest which go beyond Cape Cod. (App. 32) In the early fall, menhaden reverse their migratory path and return south moving offshore by January. (App. 32, 75-83, 93-99) This completes their annual cycle.

The composition by age group of the annual catch reflects the migratory nature of menhaden and the interdependence of the menhaden fisheries off all Atlantic coastal states. In recent years, age two menhaden dominated landings along the entire Atlantic seaboard including Chesapeake Bay. (App. 112) Age one fish comprised a greater

* Fish tagged as juveniles in Chesapeake Bay and in waters north thereof have been later captured as one year olds as far south as Florida waters. (App. 74)

percentage of the South Atlantic catch than that of the Chesapeake Bay area. National Marine Fisheries Service, Report to The National Fish Meal and Oil Association, March 15-17, 1976, at 7-8. Older fish, age three and older, were more prevalent in catches in areas north of Chesapeake Bay. (App. 111-112) Virginia's interest in the management of the stock of menhaden off its shores parallels that of all the Atlantic coastal states. Each fishery is dependent on the unit population travelling throughout the Atlantic range. The repopulation of a particular menhaden fishery, whether off the shores of Virginia or any other coastal state, depends upon reproduction by female menhaden three years old or older. (App. 99)

Commercial fishing for menhaden is conducted during the summer migratory period when the fish remain close inshore and travel in large, thickly packed schools on or near the surface. (App. 24) This contrasts with the winter months when menhaden are dispersed off-shore in deep water and stay away from the surface. (App. 24, 75) It is not feasible to fish for menhaden commercially except within the three mile limit where the great bulk of menhaden are captured. In 1975, approximately 95% of the United States commercial catch of menhaden was taken within three miles of the coast.* U.S. Dept. of Commerce, Fisheries of the United States, 1975, Current Fisheries Statistics No. 6900 (1976), at 18.

Commercial fishing for menhaden is accomplished by using a net known as a purse seine which surrounds the school of menhaden and is drawn closely at the bottom, trapping the fish. (App. 33)

The 1975 menhaden catch of approximately 1.9 billion pounds constituted 44% of the total commercial landings of all fish by United States fishing craft that year. The raw catch of that species had a value of approximately

* Since foreign flag vessels are not permitted to fish within United States waters, they are not a factor in the menhaden fishery.

$39,300,000; its processed value was approximately $80,600,000. U.S. DEPT. OF COMMERCE, FISHERIES OF THE UNITED STATES, 1975, *supra* at 18-19, 37.

Appellees Seacoast and its subsidiaries, and their predecessors have, over the years, caught substantial amounts of menhaden within Virginia waters and in so doing have lawfully applied for and received licenses for such activities from the Commonwealth of Virginia until the enactment of the 1975 legislation hereinafter referred to. (App. 4, 37)

The three major menhaden fishing companies in the United States in the order of size are Zapata, Seacoast and Standard. Unlike Seacoast, the other two companies have plants in Virginia, are engaged in the processing of menhaden in that state and they are not alien owned. (App. 28) Zapata, unlike Seacoast is also engaged in fishing for species other than menhaden.

Seacoast operates processing plants in New Jersey and Louisiana, it has fishmeal terminals in Delaware and Texas and a shipyard in Louisiana and Maryland* (App. 5); Zapata has "shorebases for fishing vessels, plants and offices located in Virginia, North Carolina, Maryland, Mississippi, Louisiana, California and Puerto Rico"** and Standard has plants in Virginia, North Carolina and Mississippi***.

Exclusionary Legislation

After approval by the Department of Commerce of the transfer of the fishing vessels to Seacoast and Smith Meal,

* In earlier years Seacoast's predecessor company had plants in Virginia and fished in Chesapeake Bay.

** Statement of Paul L. Kelley, Vice President—Administration, Zapata, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 1-2.

***Statement by H. R. Humphreys, Jr., President of Standard, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 1.

a Virginia congressman, Hon. Thomas N. Downing, in late 1974, introduced a proposed Federal bill, H.R. 17048, 93rd Cong., 2d Sess., (1974), to forbid licensing of U.S. flag fishing vessels by a corporation if more than 25% of its stock were owned by aliens. This bill, which was introduced by Congressman Downing at Zapata's request, would have banned Seacoast from all menhaden fishing. Officials of the State and Treasury Departments opposed H.R. 17048 on the grounds that it would conflict with the efforts of the United States to promote the free flow of international investments and would impede efforts of the United States to achieve agreements with other nations regarding fisheries conservation.* H.R. 17048 failed to obtain committee approval and died.

Zapata then had a bill introduced into the Virginia legislature in 1975 which was similar in effect to the defeated bill, H.R. 17048; it excludes any fishing by aliens, including alien-owned corporations, in Virginia waters. (App. 59-60) The Virginia General Assembly passed the bill, without notice, as special "emergency" legislation, a statute ultimately embodied in § 28.1-81.1 of the CODE OF VIRGINIA (1950), as amended. (App. 62-63)

It was conceded by Appellant James E. Douglas, Jr., Commissioner of Virginia Marine Resources, who is responsible for enforcing § 28.1-81.1, that the bill was limited in its effect to Seacoast and its subsidiaries and no one else. (App. 58-60) Appellant also testified that the bill was not designed to have a beneficial effect on the fisheries in Virginia or the United States. (App. 59-60) Additionally, Appellant acknowledged that this enactment would not prevent domestic menhaden corporations from engaging in predatory fishing practices. (App. 57, 59) Appellant could think of no reasons why the bill was treated as special

* Statement of John A. Bushnell, Deputy Assistant Secretary of the Treasury, *infra* p. 34; Statement of Richard J. Smith, Director, Office of Investment Affairs, Department of State, *infra* p. 35.

"emergency" legislation other than to speed up the enactment in order to prevent Appellees from obtaining a license for the 1975 menhaden fishing season. (App. 63)

In May 1975 Appellee Smith Meal applied to the Virginia Marine Resources Commission for Virginia menhaden fishing licenses. (App. 34) The applications were rejected. The Commission wrote Smith Meal that such licenses were not available to corporations, such as Smith Meal, controlled directly or indirectly by foreign interests, under § 28.1-81.1 of the CODE OF VIRGINIA (1950), as amended. (App. 34)

In addition to the new § 28.1-81.1 which would exclude Appellees from fishing for menhaden in any Virginia waters, whether coastal or inland, that state has, for many years, forbidden *nonresident* fishermen, individual and corporate, from fishing for menhaden within the Virginia portion of Chesapeake Bay, § 28.1-60(3), CODE OF VIRGINIA (1950), as amended.*

Appellees, by virtue of this statute, are precluded from pursuing menhaden into Chesapeake Bay simply because they are not Virginia corporations. The practical effect of this legislation is the prevention of menhaden fishing in these waters by only one major commercial fisher, Seacoast and subsidiaries, which in turn are the only real competitors of the Virginia menhaden fishing corporations, Zapata and Standard. (App. 28, 59, 108)

The origin of the prohibition against nonresidents fishing for menhaden in Virginia waters dates back to 1871.

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* Violations of VIRGINIA CODE § 28.1-60(3) and § 28.1-81.1 constitute misdemeanors under § 28.1-60(6) and § 28.1-187 of such CODE, and the Commissioner of Marine Resources, any member of such Commission, all inspectors, police captains and other employees designated by the Commissioner in the service have the power, with or without warrant, to arrest any person or persons violating any of the fish or shellfish laws, and to seize any vessel, boat, craft, motor vehicle, conveyance or other thing used in such violation. § 28.1-185, CODE OF VIRGINIA (1950), as amended.

Laws of Virginia, Acts of Assembly of 1871, Chapter 182. No conservation purpose was recited in the statute, which originally also barred nonresidents from even erecting a plant in Virginia to process menhaden wherever caught. Apparently, the Virginia statute originated as discrimination against nonresidents because of their status as such.*

The 1871 statute as thereafter amended was relaxed as against nonresidents for the first time by a 1938 amendment which removed the total ban against nonresidents fishing for menhaden in Virginia waters but still prohibited nonresidents from such fishing in Chesapeake Bay. Laws of Virginia, Acts of Assembly of 1938, Chapter 199. That amendment required disclosures from nonresidents to insure that ". . . none of the laws of the State *designed to prohibit non-residents from fishing* . . . . will be violated or evaded" by the granting of a nonresident fishing license. (Laws of Virginia, Acts of the Assembly of 1938, Chapter 199, Section 3179) (emphasis added).

As noted above, the District Court held both the citizenship statute (§ 28.1-81.1) and the nonresident statute (§ 28.1-60) to be unconstitutional.

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* THE UNITED STATES COMMISSION OF FISH AND FISHERIES, REPORT OF THE COMMISSIONER FOR 1877, APPENDIX A, *The Natural and Economical History of the American Manhaden,* at 117 states:

> "The Quinnipiac Fertilizer Company, of New Haven, inaugurated menhaden fishing in North Carolina and Virginia in 1866. Their prospecting party passed the winter in Roanoke Sound and established weirs for the capture of menhaden, which were there very abundant. They were, however, driven away by the natives, whose jealousy of strange fishermen led them to tear up their weirs. They then located themselves near Cape Charles. Four companies established factories here—one from Maine, one from Long Island, and two from New London. They found the fishery very good, although the fish produced little oil, and were only adapted for the manufacture of fertilizers. The laws of Virginia do not encourage the inauguration of such enterprises by strangers, and the following year it was thought unadvisable to continue the business.

SUMMARY OF ARGUMENT

1. Historically, Appellees' vessels were enrolled in the United States fishery and carried the United States flag. These vessels pursued menhaden as those fish moved in schools in their migratory routes along the coastal waters and bays of the Atlantic coast. When corporate ownership of Appellees was acquired by a corporation of the United Kingdom, Appellees were required to obtain approval of the Department of Commerce in order that their vessels might continue to be owned by Appellees and operated in the United States fishery under the United States flag. After hearings at which Appellees' competitors appeared and objected, and at which, among other factors, the effects on competition and conservation of fisheries were considered, approval was granted. The existence of a comprehensive Federal system which was used for the enrollment and licensing of Appellees' vessels preempts any right of Virginia to adopt and enforce legislation which would exclude Appellees from waters subject to that state's jurisdiction. Appellees do not claim they are immune from valid regulatory measures of Virginia applicable to all vessels fishing for menhaden in its waters, such as statutes regulating the size of nets, for example. Appellees' position is more narrowly defined: they concede Virginia has wide latitude to adopt reasonable conservation measures applicable to all, but they deny Virginia has the right to exclude from its fishery vessels duly licensed to fish by the United States government and legally entitled to sail under the United States flag, solely because the Appellee corporate owners of such vessels are nonresidents of Virginia and are themselves owned by aliens.

2. The Virginia statutes challenged here intrude into the area of international affairs reserved exclusively for the Federal government. International economic policy is determined solely at the Federal level. The established

policy of the United States has been to favor free flow of international investments. Virginia's attempt to exclude foreign owned United States corporations and thereby deprive their alien owners of the value of their investment in the United States runs counter to United States policy and is inconsistent with the determinations of the Department of Commerce that Appellees' vessels are entitled to continue to fish for menhaden within United States waters. Such attempt would also inhibit the ability of the Federal government to obtain international agreements regarding fishery conservation.

3. The Equal Protection Clause of the Fourteenth Amendment to the Constitution protects Appellees from the invidious discrimination that results from the attempt of Virginia to exclude Appellees' vessels from the Chesapeake Bay and the coastal waters of Virginia solely because Appellees are nonresidents of the state and are foreign owned. No reasonable basis for such arbitrary classification has been or could be shown.

4. Virginia's refusal to grant Appellees a license to take menhaden in Virginia waters imposes an unlawful and discriminatory burden upon interstate commerce. The fish, the vessels that catch them and the men on board all move in interstate commerce. Upon landing the fish are processed and the products continue to move in interstate commerce. Within the proper limits of state concern, Virginia may regulate the menhaden fishery in its waters, but it is not free to monopolize the fishery for the benefit of residents of Virginia and citizens of the United States.

5. There was no basis for the Court below to abstain from the exercise of its jurisdiction. The facts were fully developed and show there was no need to refer any questions to the Courts of Virginia for interpretation of state law.

Under the statutes challenged, the Appellant was obliged to deny Appellees' application for a license to catch menhaden. The familiar principles of abstention have no application in these circumstances, particularly where the immediate and irreparable harm to Appellees resulting from the deprivation of a license was plainly shown.

ARGUMENT

Introduction

In light of the position taken by Appellant and the various *Amici,* it seems necessary to restate the essential issues of this case as distinguished from the variety of extraneous questions presented by our opponents. This case presents essentially two questions:

(a) Can Appellees be excluded from Virginia waters because ultimately they are owned by a corporation of the United Kingdom?

(b) Can Appellees be excluded from Virginia waters because they are not corporate residents of Virginia?

Our opponents, however, attempt to disguise the legislation in question, which is in fact nothing more than an effort by local Virginia fishermen to obtain a monopoly for themselves, as a conservation measure needed to preserve a valued natural resource against supposed depredations of irresponsible foreigners and in fact all non-Virginians. There is no basis in fact for Appellant's arguments. And Virginia's interest in menhaden is no different in kind from those of the various other Atlantic coastal states visited by these fish in their annual migration.

Appellant's claims are afterthoughts unsupported by the record. Appellant himself testified as to the origin of the statutes held unconstitutional below and made no pretense of suggesting that Appellees' application for a

license presented any threat to the preservation of the menhaden fishery in Virginia. Virginia imposes no limit on the size of the catch or the number of boats used in its waters. There is no reason to suppose that the size of the catch ultimately will be decreased as a result of exclusion of Appellees' vessels. There is, however, every reason to suppose that Appellees' competitors in Virginia will profit as a result of their successful efforts to persuade the Virginia legislature to exclude "foreigners" from their waters.

Although Appellant had every opportunity to put in evidence any material which would justify Virginia's asserted right to exclude aliens and nonresidents, no such evidence was presented even in general terms, and there was certainly no evidence that Appellees in particular posed any threat to any valid conservation interest of Virginia. Appellees have never claimed that they are immune from reasonable nondiscrimatory state regulations while fishing in Virginia waters, but they do claim that Virginia has no right to exclude them from that fishery.

I

Under Accepted Standards of Supremacy and Preemption a State May Not Preclude Duly Enrolled and Licensed U.S. Flag Vessels from Fishing in Its Waters on the Basis of the Residence of Their Owner or the Nationality of the Shareholders of Their Owner.

As determined by the District Court, Federal law conclusively establishes that Appellees, although foreign owned, are entitled to fish in Virginia waters with their U.S. flag fishing vessels on the same basis as all other owners of U.S. flag fishing vessels. This question has been preempted by a comprehensive system of Federal statutes providing for the enrollment of such vessels and licensing them for fishing. These statutes, dating from 1792 and augmented and modified from time to time, both

license fishing and regulate in detail the nationality and ownership requirements for vessel owners.

Federal licensing alone defeats Virginia's efforts to exclude Appellees' vessels on grounds of nonresidence and foreign ownership, because such criteria would negate the Federal authority. This result Federal supremacy will not permit. In the words of *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 210 (1824), the Virginia statutes "come into collision with an act of congress" and deprive a Federal licensee of a right to which the act entitles it. This proposition is discussed in Point A below. In Points B and C Appellees argue more narrowly that the Virginia statute which excludes fishing by corporations owned by aliens (Section 28.1-81.1) must fail because it conflicts with specific Federal statutes prescribing the nationality requirements for owners of licensed U.S. flag fishing vessels, and because it intrudes into the area of foreign affairs.

Appellees, however, emphatically do *not* contend that the Federal statutes preempt the power of the states to regulate fishing in their waters in such other manner as they may deem necessary if it is consistent with the Constitution and applicable law. Nor did the opinion of the Court below hold that Federal statutes had such effect. The Appellant's and the *Amicus* brief of Appellees' competitor Zapata and certain other seafood processors (the "Competitor's brief") argue that the District Court's decision holds that 16 U.S.C. § 1081 preempts all power of Virginia with respect to fishing in its territorial waters. This misunderstanding may also have prompted the filing of *Amicus* briefs by certain of the states. Appellees stress, however, that invalidation of all state regulation of fishing is not an issue in this case. Taken in its context, the Court's holding was merely that 16 U.S.C. § 1081 preempted the power of Virginia and every other state to declare that some owners of licensed United States fishing vessels may fish in its waters but

others may not because of the nationality of their shareholders.

For this reason, large parts of the arguments of the Appellant and the *Amici* are beside the point. The Appellees do not argue that the Federal statutes which have preempted the Virginia statutes in question either deny the states the authority conferred by the Submerged Lands Act, 43 U.S.C. § 1311(a), to manage and administer the natural resources in their territorial waters, or conflict with the Contiguous Fishery Zone Act, 16 U.S.C. § 1094, the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64, or the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1856(a), which specifically preserve, but do not expand, such powers.

For the same reason, the Appellees have no quarrel with any of the cases the Appellant and the *Amici* rely upon; *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891); *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855); and *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). These cases recognize the power of states to regulate the manner in which the activities of licensed United States vessels are conducted: the kinds of nets, seines, scoops, drags, and other equipment which can be used for fishing in the first two cases and smoke emission by vessels in *Huron.* This Court held that even though the vessels in question were licensed, the states had the power to enact the challenged legislation. As the Court said in *Huron,* the state regulations were "the normal incidents of local police power not constituting a direct regulation of commerce," 362 U.S. at 447. Unlike the statute invalidated in *Gibbons,* and the statutes in this case, such state regulations did not completely and permanently prevent certain Federal licensees from carrying on their licensed activity. And unlike the Virginia citizenship statute the matters regulated by the states in those cases were not already covered by contrary Federal statutes.

A. Appellees by virtue of their licenses under 46 U.S.C. §§ 251 and 263 have authority to fish for menhaden in state waters, including Chesapeake Bay, which may not be precluded by Sections 28.1-60 and 28.1-81.1 of the Virginia Code.

1. The licenses granted to Appellees' vessels authorize Appellees to fish in state waters.

The Federal licensing statutes, 46 U.S.C. §§ 251, 263, grant to Appellees' vessels, and to all other vessels similarly licensed, whether owned by citizens or by alien-owned U.S. corporations, an equal authority to fish in all navigable waters. Appellees recognize, however, that in authorizing fishing, Congress did not intend to preempt every kind of regulation of fishing, and that the Federal government has left to the states broad regulatory power over fishing within their waters. In the exercise of that power, a state may adopt reasonable and even-handed measures (including its own licensing measures) to regulate the manner in which licensed fishing vessels conduct their operations. But the exact range of state power does not have to be determined in this case because Virginia has clearly over-reached its power. For, clearly, in licensing fishing vessels the Federal government did not intend that the states should be able to nullify those licenses by prohibiting the activity which they authorize. This is what the Virginia statutes would do by excluding completely and permanently particular classes of licensed owners of U.S. flag fishing vessels.

The proposition asserted in the Appellant's and Competitor's briefs, that the licensing statutes do not license fishing but merely identify a vessel's use, is wrong, and it has been clear that it is wrong since *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). This Court held in *Gibbons* that a New York statute, which granted a monopoly to certain persons for navigating state waters with vessels moved by fire or steam, unlawfully prevented steamboats licensed for the coasting trade from exercising the privileges and authority which their Federal license granted. Accordingly, §§ 28.1-60 and 28.1-81.1 of the VIRGINIA CODE (1950), as

amended, which purport to prohibit Appellees' vessels from exercising their Federal privilege and authority to fish on the basis of Appellees' nonresidence in Virginia and foreign ownership, are invalid.

Each of Seacoast's vessels is enrolled and licensed. The language of the license is prescribed by 46 U.S.C. § 263 and reads:

> "License is hereby granted for said vessel to be employed in carrying on the Mackerel Fishery for one year from the date hereof and no longer."*

Under 46 U.S.C. § 251(a), vessels which are both enrolled and licensed (and certain vessels which are licensed):

> "and no others shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries."

In discussing a license granted for the coasting trade pursuant to the statutes quoted above, Chief Justice Marshall in *Gibbons* said:

> "The first section [46 U.S.C. § 251(a)] declares, that . . . vessels, enrolled as described in that act, and having a license in force, as is by the act required, 'and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade.' This section seems to the court to contain a positive enactment, that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe

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* For the purpose of licensing, the mackerel fishery includes the menhaden fishery. 46 C.F.R. § 67.07-13(b).

these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act.

The fourth section [46 U.S.C. § 263] directs the proper officer to grant to a vessel qualified to receive it, 'a license for carrying on the coasting trade,' and prescribes its form. . . . [T]he operative words of the instrument are, 'license is hereby granted for the said steam-boat Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.' These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself. *The word 'license,' means permission or authority; and a license to do any particular thing, is a permission or authority to do that thing; and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize.* . . . The license must be understood to be what it purports to be, a legislative authority to the steam-boat Bellona, 'to be employed in carrying on the coasting trade, for one year from this date.' " 22 U.S. (9 Wheat.) at 212-213 (emphasis added).

No doubt, as discussed below, Federally licensed fishing or coastwise trade is subject to reasonable state regulation. But there can also be no doubt that such Federal licenses in fact authorize such fishing and trade, and that any state regulation must not defeat the rights granted.*

*Since *Gibbons*, an amendment to 46 U.S.C. § 263 eliminates any doubt and fully confirms that Appellees' licenses give them an affirmative right to fish. The amendment was enacted to allow vessels to procure a consolidated license for both the coasting trade and the fisheries, as the earlier statute had been interpreted to allow licenses either for the coasting trade or the fisheries, but not both. *H.R. Rep. No. 2288, 74th Cong., 2d Sess. (1936); S. Rep. No. 1958, 74th Cong., 2d Sess. (1936).* Under the amendment and the present statute:

". . . vessels . . . licensed for the 'coasting trade and mackerel fishery' . . . shall be deemed to have sufficient license for engaging in the coasting trade and *the taking of fish of every description,* . . ." 46 U.S.C. § 263 (emphasis added).

2. The Federal government has the power to grant a license to fish in state waters.

Neither 46 U.S.C. § 251 nor § 263 makes any distinction between the high seas, the territorial sea of the United States or inland waters or otherwise limits in any way the fishing rights they grant. Moreover, since the Court in *Gibbons* construed the antecedents of § 251 and § 263 to override a state statute governing the territorial waters of New York, it is apparent that such sections grant the right to engage in fishing or the coasting trade in state waters.

Appellant implies that the Federal government does not have the power to license fishing within the territorial waters of the states. Appellant contends that the statutes licensing fishing are based solely on Congressional power over commerce and cites *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), for the proposition that Federal power over commerce does not extend to the regulation of the taking of fish. Appellant also cites *Toomer* v. *Witsell,* 334 U.S. 385 (1948), for the proposition that the taking of fish occurs before the fish have entered the stream of commerce.

Appellant misreads both *Manchester* and *Toomer*. *Manchester* holds that since Congress had not regulated an aspect of fishing (the equipment used in taking menhaden), Massachusetts was still free to do so. It did not hold that Congress lacked the power to regulate and still less did it hold that Congress could not authorize fishing in state waters. The final two paragraphs of the opinion read:

"The pertinent observation may be made that, as Congress does not assert, by legislation, a right to con-

trol pilots in the bays, inlets, rivers, harbors, and ports of the United States, but leaves the regulation of that matter to the States, *Cooley* v. *Board of Wardens,* 12 How. 299, so, if it does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays.

We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State." 139 U.S. at 266.

The question of a state's right to tax the taking of fish, as in *Toomer,* is of slight relevance to the question of whether the taking of fish is related closely enough to interstate commerce to support Federal licensing. That it is so related can hardly be doubted. As discussed more fully below, the capture, processing, transportation and sale of menhaden affect interstate commerce in many ways, any one of which would support the Federal licensing statutes. *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964).

More directly to the point, the Court of Appeals for the Ninth Circuit in *Anderson* v. *Mullaney,* 191 F.2d 123 (9th Cir. 1951), *aff'd on other grounds,* 342 U.S. 415 (1952), concluded that the movement of the fishermen themselves to the Alaska salmon fishery involves interstate movement and commerce. This holding is particularly pertinent because it is fishermen and fishing vessels that are licensed by the Federal licensing statutes.

Quite apart from commerce, however, Appellant cannot sustain the proposition that the United States lacks the power to license fishing vessels to fish in state waters. *United States* v. *California,* 332 U.S. 19 (1947), should be completely dispositive of the question since it held that the Federal government has always had paramount authority over the territorial seas and the natural resources within them. This holding has been frequently reaffirmed by this Court as having been unaffected by the Submerged Lands Act, 43 U.S.C. §§ 1311-15, which constituted an exercise and not a repudiation of the Federal power. *United States* v. *Maine,* 420 U.S. 515 (1975).

3. The Virginia statutes do not constitute reasonable regulation but are discriminatory and exclusionary in direct conflict with Appellees' rights under Federal law.

The Appellant's and the Competitor's briefs argue that *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855), and *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), demonstrate that Federal licenses for fishing do not constitute a grant of a right to fish.

In fact, however, these cases establish only that notwithstanding Federal licensing the states retain the power to regulate fishing and the coasting trade in state waters if they do so in a reasonable and non-discriminatory way, and if other Federal law has not already regulated the same matter. It is obvious, however, that the Virginia statutes do not constitute that kind of regulation. Completely prohibiting certain licensees from carrying on their licensed activities is not comparable to regulating the manner in which licensed activities are conducted, and indeed can hardly be called "regulation" at all.

As discussed *supra* at 19-20, the statutes considered in *Manchester, Smith* and *Huron* applied even-handedly to

all Federal licensees and could be complied with by all Federal licensees. The Virginia statutes by contrast are of the kind that was held unconstitutional in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). There was no way in that case that those not granted the monopoly could qualify under the New York statute to carry on the coasting trade for which they had a Federal license. Similarly, in the present case Appellees, although licensed and authorized to engage in fishing by the United States, are prohibited from doing so by the Virginia statutes containing residence and citizenship requirements they cannot meet. Much less serious limitations on the exercise of a Federal license have been held unconstitutional. See *Harman* v. *Chicago,* 147 U.S. 96 (1893). Under these circumstances the exclusionary Virginia legislation must be invalidated.

B. The enrollment and licensing statutes (46 U.S.C. §§ 11, 251, 252, 263), Sections 9 and 37 of the Shipping Act, 1916 (46 U.S.C. §§ 808, 835), the Bartlett Act (16 U.S.C. § 1081) and the Fishery Conservation and Management Act of 1976 (16 U.S.C. §§ 1801-82) constitute a comprehensive Federal legislative scheme that preempts the Virginia statute (Section 28.1-81.1) prohibiting vessels from fishing because of the nationality of the stockholders of their corporate owners.

A comprehensive scheme of Federal legislation completely regulates the nationality of the owners of U.S. flag vessels, including fishing vessels, and it is clear "that Congress left no room for the State[s] to supplement" the Federal scheme. *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 229-230 (1947). Congress has thoroughly considered and precisely determined the extent to which United States and foreign interests may participate in the ownership of vessels licensed by the United States for the fishing trade. In doing so, Congress has done what it had not done in *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). There Massachusetts was entitled to regulate the kinds of nets

and seines to be used in menhaden fishing because Congress had not done so. Here, however, Congress has explicitly controlled the matters which Virginia has also attempted to control. United States law has occupied this field and Virginia's inconsistent statute cannot supersede it.

1. Historic development.

The documentation statutes originated in the Acts of December 13, 1792, 1 Stat. 287, and February 18, 1793, 1 Stat. 305—307, and are now codified in 46 U.S.C. §§ 11, 251, 252, 263. Under these documentation statutes, U.S. flag vessels are documented in two categories: (1) those registered and (2) those enrolled and licensed or simply licensed. Generally, the purpose of a register is to declare the nationality of a vessel and to authorize it to engage in *foreign* trade. The purpose of an enrollment and license is to declare the nationality of a vessel and to authorize it to engage in *domestic* trade. An enrolled vessel may obtain a license to engage in fishing or in the coasting trade or in both.* 46 U.S.C. §§ 11, 251, 263.

The registration of a vessel for the foreign trade and the enrollment of a vessel for the coasting trade or fisheries, establish its "American character" entitling it to the privileges of a vessel of the United States engaged in those trades. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 214. In other words, the tests for ascertaining the "American character" of the owner of a vessel are for the purpose of determining whether such owner is sufficiently "American" to be granted the privileges and authorizations which Congress extends by registering or enrolling and licensing its vessels.

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* Both registered vessels and enrolled and licensed vessels may engage in fishing, 19 C.F.R. § 4.96(c) (1975); *Pacific Shrimp Company* v. *United States Dept. of Trans.,* 375 F. Supp. 1036, 1039 (W. D. Wash. 1974), and all such vessels are vessels of the United States, entitled to the benefits and privileges thereof. 46 U.S.C. §§ 221, 251.

Throughout the history of the documentation statutes, Congress has been acutely aware of and has given careful attention to the question of the ownership by aliens of vessel owning corporations.* With the Merchant Marine Act, 1920, Congress imposed a requirement that corporations operating vessels engaged in the coastwise trade must be 75% owned by United States citizens. 46 U.S.C. §§ 802, 883. When it adopted that Act Congress was urged by the Shipping Board to take more stringent measures regarding alien stock interest in U.S. flag vessels. S. Rep. No. 543, 66th Cong., 2d Sess. (1920). Congress, however, declined to do so and even declined to extend the requirement of 75% United States citizen ownership to fishing vessels or vessels engaged in foreign trade.

In 1959, Congress amended the documentation statutes to make clear that United States corporations with a limited number of foreign directors could document their vessels

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* At one time, Federal law did preclude corporations with alien stock ownership from documenting vessels for fishing and other purposes. Act of March 13, 1825, § 5, 4 Stat. 129. However, in 1858 Congress eliminated the prohibition on alien stock ownership while leaving unaffected the prohibition on direct foreign ownership of vessels. Act of June 11, 1858, 11 Stat. 313. The history of these amendments is summarized in the Senate Report accompanying a proposed amendment to the documentation statutes:

> "From 1825 to 1858, by administrative determination, a corporation could not document vessels unless United States citizens owned 100 percent of the stock. In 1858, the 1825 law was amended so that United States corporations with alien stockholders could document vessels and operate them in foreign or domestic trade. The Panama Canal Act of 1912 further amended the law and authorized the registration of a vessel not more than 5 years old "wherever" built, which is (a) 100 percent American-owned or (b) owned by a corporation whose president and managing directors are United States citizens." *S. Rep. No. 2145, 85th Cong., 2d Sess. (1958).*

The Panama Canal Act referred to in the foregoing quotation established the criteria for citizenship until the amendment in 1959 referred to in the text.

for the coasting trade, foreign trade or the fisheries. The accompanying Senate Report shows that Congress reconsidered the question of foreign ownership of United States vessel owning corporations and made a decision not to change the law which permitted such corporations to document vessels:

> "The question of ownership of corporations is not affected to the slightest degree by the provisions of the bill." S. Rep. No. 728, 86th Cong., 1st Sess. (1959).

At the present time the tests for the "American character" of a vessel registered for the foreign trade or enrolled for the fisheries are prescribed by 46 U.S.C. §§ 11 and 252. These Sections provide that for a corporation to register or enroll vessels it must be organized under the laws of the United States or of a state, its president or other chief executive officer and its chairman of the board of directors must be citizens of the United States and no more than a minority of the number of directors necessary to constitute a quorum may be noncitizens.* These provisions are implemented by a whole array of Federal statutes.** The "American character" of a U.S. flag

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* For vessels engaged in the coastwise trade, 46 U.S.C. §§ 802 and 883 impose the further requirement that the vessel owning corporation must be 75% owned by United States citizens.

** Those statutes implementing such provisions with respect to vessels enrolled and licensed for the fisheries include the following. Before enrollment, an officer or agent of the owning corporation must take an oath as to the qualifications of the owner and the absence of impermissible foreign interest. 46 U.S.C. §§ 19, 252; 46 C.F.R. §§ 67.21, 67.23. A licensed vessel is subject to forfeiture upon transfer, in whole or in part, to any noncitizen or nonresident. 46 U.S.C. § 325. Upon such a transfer the vessel loses the privileges of a vessel of the United States. 46 U.S.C. §§ 221, 325. If a corporation qualifies as a United States citizen under the less rigorous tests of 46 U.S.C. § 883-1 enabling such corporation to engage in a specially restricted coastwise trade, it is nevertheless prohibited from engaging in fishing. 46 U.S.C. § 883-1.

vessel is further assured by the United States citizenship requirements for the master, officers and crew. 46 U.S.C. §§ 221, 252, 672, 1132.

2. Necessity for approval of Department of Commerce before a noncitizen acquires a U.S. flag vessel.

With the enactment of §§ 9 and 37 of the Shipping Act, 1916, 46 U.S.C. §§ 808, 835, the nationality tests for the documentation of vessels have been buttressed by the requirement that the transfer to noncitizens of interests in a vessel under construction in the United States, documented in the United States or owned in whole or in part by United States citizens must be approved by the Secretary of Commerce. Under these provisions, the entry into the United States fisheries by noncitizens must prior to entry be reviewed by the Secretary of Commerce: if the noncitizens seek to purchase a controlling interest in a United States corporation engaged in the fisheries with U.S. flag vessels, that purchase must be approved; alternatively, if the noncitizens create a United States corporation qualified by virtue of its officers and directors to enroll vessels, the acquisition of U.S. flag fishing vessels by such corporation must be approved. Consequently, and notwithstanding the contentions of the Appellant to the contrary, the entry into the United States fisheries by noncitizens is in all cases subject to the control of the Secretary of Commerce.

Appellees' licenses were obtained only after hearings in the Department of Commerce which considered the effect of granting the licenses on "(a) conservation and management of the fisheries resources, (b) the employment of U.S. citizens, (c) U.S. consumers, (d) competition and (e) other social and economic factors." 38 Fed. Reg. 29239-40 (1973). Certainly this Federal process was not followed only to be nullified at the option of a state.

3. Effect of the Bartlett Act on the U.S. fishery.

The policy of licensing for fishing in United States waters of U.S. flag vessels that meet the nationality tests

of the enrollment and licensing statutes and the Shipping Act, 1916, 46 U.S.C. §§ 808,835, was restated in the Bartlett Act, 16 U.S.C. § 1081, enacted in 1964. The Bartlett Act had the sole purpose of clarifying and, more importantly, enforcing the provision of 46 U.S.C. § 251(a) providing that licensed U.S. flag fishing vessels "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the . . . fisheries." H.R. Rep. No. 1356, 88th Cong., 2d Sess. (1964); S. Rep. No. 500, 88th Cong., 1st Sess. (1963). Section 1081 provides, in part, that:

> "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . ."

The Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-82, repeals the Bartlett Act as of March 1, 1977, but in Section 307, 16 U.S.C. § 1857, substitutes a provision which even more clearly than the Bartlett Act applies to all Virginia waters:

> "It is unlawful —
>
> . . . .
>
> (2) for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage in fishing —
>
> (A) within the boundaries of any State; . . . ."

Under Section 307 the authority of U.S. flag fishing vessels to fish in waters of the United States unmistakeably applies to any navigable waters within a state and is not limited to ocean waters within three miles of the coast.

Appellant attempts to treat the Bartlett Act as being merely a prohibition of fishing by foreign vessels. The Court below correctly thought differently. The Bartlett

Act, in conjunction with the statutes providing for enrolling and licensing of U.S. flag vessels, clearly demonstrates a Congressional intention to deny any right of foreign flag vessels and confirm the right of U.S. flag vessels to fish in United States waters. Otherwise valid state laws subjecting U.S. flag fishing vessels to regulation in their manner of operation or with respect to matters not treated by the licensing statutes, would not be invalidated by the Bartlett Act and the Fishery Conservation and Management Act of 1976. However, when as here, the state law purports to "regulate" matters comprehensively treated by the Federal licensing statutes, such inconsistent state laws cannot remain in effect.

The enrollment and licensing statutes, developed as described above over a long period of time, buttressed by the approval requirements of the Shipping Act, 1916, and clarified and reinforced by the Bartlett Act and the Fishery Conservation and Management Act of 1976, constitute a comprehensive system of Federal law that forecloses any state effort to prescribe nationality tests for fishing by U.S. flag fishing vessels. The Virginia citizenship statute must, therefor, fail.

C. The Virginia citizenship statute (Section 28.1-81.1) improperly intrudes into the Federal domain of international affairs.

It his repeatly been recognized by this Court that the conduct of this nation's foreign affairs is the exclusive province of the Federal government. *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *United States* v. *Pink*, 315 U.S. 203 (1942); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). In *Zschernig*, this Court invalidated a state's escheat laws where such laws had more than a mere "incidental or indirect effect in foreign countries." In *Hines*, this Court invalidated a state's system for alien registration in the

face of an analogous Federal system and, after citing Article VI of the Constitution, stated:

> "The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." 312 U.S. at 63 (footnotes omitted).

Section 28.1-81.1 of the VIRGINIA CODE (1950), as amended, by prohibiting fishing in Virginia by U.S. flag vessels owned by corporations whose stock in turn is owned by aliens, directly and immediately affects United States foreign relations and conflicts with stated foreign policy objectives of the Federal government: it invites retaliation against United States fishing activities abroad, it jeopardizes the nation's ability to achieve freedom of international investment, and it impedes the nation's efforts to promote international fishery conservation.*

The drastic effect of the Virginia statute is fully demonstrated by statements before the House of Representatives Subcommittee on Merchant Marine in connection with H.R. 17048, 93rd Cong., 2d Sess. This bill was nearly iden-

* The sensitivity of the Federal government to these matters as they apply to foreign ownership of United States flag fishing vessels is shown by the final policy of NOAA regarding review of applications for transfer of U.S. flag vessels to foreign ownership. Among the matters NOAA considers are the United States policy on foreign investment and the effectiveness of international fishery conservation programs. 39 Fed. Reg. 33813 (1974).

tical in effect to the Virginia statute, except that it would have been of nationwide application, and was introduced, as described in the Statement of the Case, at the request of Seacoast's competitor Zapata after the transfer of Seacoast's and Smith Meal's fishing vessels was approved by the Department of Commerce. An official of the Treasury Department described how the bill's requirement for 75% ownership by United States citizens of the stock of corporations owning U.S. flag fishing vessels would be detrimental to the national objective of fostering liberalized regulation of international investment:

> "U.S. policy regarding international investment stresses reliance on market forces in the world economy and a desire to minimize restrictions. A two-way flow of investment between the United States and other nations can benefit all parties, and any attempt by the United States to impose restrictions on foreign investment would be detrimental to our economic interests. It is important to note that the United States has over $107 billion of direct investment abroad, compared to foreign direct investments in this country of $18 billion. The example we set in allowing foreign investment to come into the United States can significantly influence the attitudes and policies of other countries toward our investments. Enlightened self-interest requires that we continue to follow a policy of hospitality toward foreign investment rather than reverse our position." Statement of John A. Bushnell, Deputy Assistant Secretary of the Treasury, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 3.

Similarly, an official of the State Department showed that the bill would impair the national efforts of promoting both liberalized international investment and conservation of fishery resources:

> "I want to emphasize the importance of the implications of this legislation for our foreign policy. U.S.

leadership has been instrumental in maintaining liberal international trade and investment relations, relations which we view as particularly vital in this period of international economic crisis. Passage of this legislation would reduce our credibility with other nations on this issue, and would encourage other nations to engage in similar protectionist practices. In this regard, it should not be forgotten that the United States is the world's largest source of international investment flows and that a return to widespread restrictions on such investment would be most detrimental to our interests.

With specific reference to fishing, this could limit and prejudice important options available to the American fishing industry off foreign coasts as they attempt to adjust to problems that arise in connection with the establishment of a 200-mile economic zone in a Law of the Sea Treaty. Moreover, enactment of the legislation may prejudice our efforts to achieve agreement of other governments to our objectives with respect to control of salmon, and may intensify the opposition to our position on anadromous species in the Law of the Sea negotiations." Statement by Richard J. Smith, Director, Office of Investment Affairs, Department of State, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 3.

The Virginia statute would, without more, undoubtedly be constitutionally objectionable as an interference in foreign affairs. It is doubly objectionable, however, because of Federal legislation affecting the foreign affairs areas into which the Virginia statute has intruded.

Federal laws regulating investment by foreigners in U.S. flag fishing vessels, has been described above in detail. In addition the Federal government has made, by legislation and treaty, elaborate provisions regarding the international relations aspects of fishery conservation. In the

Submerged Lands Act, Congress specifically provided for Federal retention of all rights relating to international relations, 43 U.S.C. § 1314(a). The Bartlett Act, 16 U.S.C. §§ 1081-85, and the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-82, contemplate international agreement regarding fishing. The legislative history of those statutes shows that they were enacted in the context of this nation's foreign relations policy with due Congressional deliberation on the ramifications of such regulations on international relations. H. R. REP. No. 1356, 88th Cong., 2d Sess., at 7-8 and S. REP. No. 94-416, 94th Cong., 1st Sess., at 5-17, respectively. In addition to such legislation, the United States has entered into numerous treaties and other agreements with other nations relating to fishery regulation. The Senate Report relating to the Fishery Conservation and Management Act of 1976 cites twenty-two such agreements. S. REP. No. 94-416, *supra,* at 11.

In view of the Federal government's comprehensive actions directly affecting the conduct of foreign affairs, "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Virginia statute is preempted by the Federal scheme, even if Virginia would otherwise have power to enact such legislation and even if the Virginia statute otherwise merely supplemented the Federal scheme. *Hines* v. *Davidowitz,* 312 U.S. 52, 66-67 (1941).

II

The Virginia Citizenship Statute (Section 28.1-81.1) and the Nonresident Statute (Section 28.1-60) Violate the Equal Protection Clause of the Fourteenth Amendment.

A. The citizenship statute (Section 28.1-81.1).

This Court has repeatedly struck down state legislation discriminating against aliens as violative of the Equal

Protection Clause. *Truax* v. *Raich,* 239 U.S. 33 (1915). In *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948), this Court held that a state law that "banned issuance of [fishing] licenses to any 'person ineligible to citizenship,' " 334 U.S. at 413, violated the Fourteenth Amendment.* *Graham* v. *Richardson,* 403 U.S. 365 (1971), invalidated restrictions relating to the ability of aliens to receive welfare. *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), struck down a state statute barring aliens from working in a state's civil service. *In re Griffiths,* 413 U.S. 717 (1973), invalidated a state's requirement that members of the bar be citizens. *Examining Board of Engineers, Architects and Surveyors* v. *Otero,*—U.S.—, 44 U.S.L.W. 4890 (June 16, 1976), invalidated a Puerto Rican statute that effectively barred aliens from practicing as civil engineers.

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* The Appellant's assertion that *Takahashi* was "occasioned by the racial overtones of the questioned statute and the Court's uncertainty of state ownership of marginal sea fisheries," Brief of Appellant, is misplaced. First, as the *Takahashi* Court stated with regard to the "racial overtones":

> "The state's contention that its law was passed solely as a fish conservation measure is vigorously denied. The petitioner argues that it was the outgrowth of racial antagonism directed solely against the Japanese, and that for this reason alone it cannot stand. We find it unnecessary to resolve this controversy concerning the motives that prompted enactment of the legislation. Accordingly, for purposes of our decision we may assume that the code provision was passed to conserve fish in the California coastal waters, or to protect California citizens engaged in commercial fishing from competition by Japanese aliens, or for both reasons." 334 U.S., at 418 (citations omitted).

Second, the *Takahashi* Court also had no occasion for uncertainty about fish "ownership".

> "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." 334 U.S. at 421.

In *Otero* this Court reiterated the standards relating to discrimination against aliens established by the series of cases.

> "In examining the validity of Puerto Rico's virtually complete ban on the private practice of civil engineering by aliens, we apply the standards of our recent decisions in *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973); and *In re Griffiths,* 413 U.S. 717 (1973). These cases establish that state classifications based on alienage are subject to 'strict judicial scrutiny.' *Graham* v. *Richardson,* 403 U.S., at 376. Statutes containing classifications of this kind will be upheld only if the State or territory imposing them is able to satisfy the burden of demonstrating 'that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.' *In re Griffiths,* 413 U.S., at 721-722 (footnotes omitted)." 44 U.S.L.W. at 4899.

The Court then noted that, with respect to restrictions on aliens engaging in private enterprises and occupations that are otherwise lawful,

> "... [T]he States have had the greatest difficulty in persuading this Court that their interests are substantial

Finally, the *Takahashi* Court distinguished the discriminations upheld in *Terrace* v. *Thompson,* 263 U.S. 197 (1923), and *Porterfield* v. *Webb,* 263 U.S. 225 (1923), relating to land ownership and cited by the Appellant as instances of the "right of the states to determine that property held in trust for the citizens of the state could be reserved for use by U.S. citizens exclusively." Brief of Appellant at 30. The Court noted:

> "This leaves for consideration the argument that this law should be upheld on authority of those cases which have sustained state laws barring aliens ineligible to citizenship from land ownership. Assuming the continued validity of those cases, we think they could not in any event be controlling here. They rested solely upon the power of states to control the devolution and ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property. They cannot be extended to cover this case." 334 U.S. at 422 (footnotes omitted).

> and constitutionally permissible, and that their discrimination is necessary for the safeguarding of those interests." 44 U.S.L.W. at 4900.

The Court went on to hold that even with respect to public employment and the distribution of public resources:

> "In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." 44 U.S.L.W. at 4900.

From *Otero* and other recent alien discrimination cases in this Court, it is clear that the Virginia citizenship statute violates the Equal Protection Clause.*

1. The Virginia citizenship statute contains a suspect classification.

By its terms, the Virginia citizenship statute discriminates against aliens by refusing them licenses for fishing. The argument by the Appellant that the "higher standard of review [required for legislation discriminating against individual aliens] is not demanded here, where the Appellees are foreign-owned corporate entities," Brief of Appellant at 24, and the argument by *Amici* in the Competitor's brief, at 29, that "[o]nly in cases where *individual* rights are concerned has a majority of this Court deemed it necessary to apply a higher standard of review to laws classifying in terms of alienage," ignore the fact that the Virginia citizenship statute effectively blocks fishing by corporations formed by alien individuals. As this Court reasoned in rejecting an argument that a treaty promoting

* See, for example, *Hampton* v *Mow Sun Wong,* —— U.S. ——, 44 U.S.L.W. 4737 (June 1, 1976), holding unconstitutional a U.S. Civil Service Commission regulation which barred resident aliens from employment in the Federal competitive civil service.

free trade did not extend to the formation of corporations by subjects of the foreign country:

> "It would be difficult to select any single agency of more universal use or more generally recognized as a usual and appropriate means of carrying on commerce and trade than the busines corporation. And it would, we think be a narrow interpretation indeed which, in the absence of restrictive language, would lead to the conclusion that the Treaty had secured to citizens of Japan the privilege of engaging in a particular business, but had denied to them the privilege of conducting that business in corporate form." *Jordan* v. *Tashiro,* 278 U.S. 123, 130 (1928).

The Virginia citizenship statute by its terms discriminates against aliens, a classification requiring strict judicial scrutiny of whether the governmental interest asserted is legitimate and substantial and whether the means adopted to protect that interest are necessary and precisely drawn.

2. The Virginia citizenship statute is neither necessary nor precisely drawn and has no reasonable basis.

The rationales suggested by the Appellant and the *Amici* in the Competitor's brief do not support the necessary and precisely drawn test established by *Otero* and its predecessors. The Virginia citizenship statute is neither necessary for promoting fishery conservation nor precisely drawn to effectuate that purpose constitutionally. Valid conservation regulations such as requirements as to net mesh size can be and have been established by the state and have a clear effect on conservation. Total exclusion of aliens, on the other hand, would not protect against overfishing by citizens. Hence, the Virginia citizenship statute is not only unnecessary, given the readily available, less restrictive alternative forms of regulation, but is also useless as a conservation measure. By the same token, the Virginia citizenship statute is not precisely drawn: it excludes all aliens whether having a

self-interest in conservation or not. In sum, then, the Virginia citizenship statute sweeps too broadly to survive the test established by *Otero.*

Appellant and *Amici* in the Competitor's brief do not try to justify the Virginia citizenship statute on the grounds that it is necessary and precisely drawn, but rather that it has a reasonable basis. Even by that test they are wholly unable to justify the statute. They argue that an alien-owned domestic corporation would overfish in Virginia until menhaden were depleted and then move on to exploit other waters, claiming that unlike citizen-owned corporations the alien-owned fishing companies would have no self-interest in conservation.

This Court recently has found similar "alien movement" justifications insufficient. In *Otero,* the ban on alien engineers was defended on the ground that it would "provide the client of a civil engineer an assurance of financial accountability if a building for which the engineer is responsible collapses. . . ." 44 U.S.L.W. at 4900. This Court held:

> "Finally, the asserted purpose to assure responsibility for negligent workmanship sweeps too broadly. United States citizenship is not a guarantee that a civil engineer will continue to reside in Puerto Rico or even in the United States, and it bears no particular or rational relationship to skill, competence, or financial responsibility. See *Sugarman* v. *Dougall,* 413 U.S., at 645; *In re Griffiths,* 413 U.S., at 724." 44 U.S.L.W. at 4900-4901.

Similarly in *Sugarman,* a state sought to justify its discrimination against hiring aliens for its civil service on the grounds that they would be "likely to remain only temporarily in a civil service position." 413 U.S. at 645. This Court held the justification unsupportable.

The purported justification based on alien-owned United States fishing corporations depleting and moving on is even

less rational than the "moving on" justifications advanced in *Sugarman* and *Otero*.

Seacoast represents an investment of in excess of $32 million by the foreign owners. The three largest menhaden fishing concerns each have extensive investments in ships, equipment and processing plants in various states. There is no rational basis, and certainly no evidence, to support a conclusion that alien-owned United States corporations such as Appellees would have any more reason to engage in irresponsible exploitation of the menhaden fishery in a specified area than would their citizen-owned competitors, given the similarity of their plant locations and the amount of their investments.

Unlike the foreign-flag fishing concerns, the alien-owned United States corporation is within the jurisdiction of the states for enforcement of fishing regulations, has property within the United States upon which judgments may be executed, and pays United States taxes, all just as if it were citizen-owned. There are in fact no relevant differences between alien-owned and citizen-owned United States corporations engaged in the menhaden fishery to warrant the discrimination between them based on stock ownership.

Section 28.1-81.1 should be recognized for what it is — protectionist legislation designed to exclude a major competitor without any justification acceptable in law. The effort to disguise the statute as an attempt to conserve the menhaden fishery is a sham. It does nothing more than it was designed to do — exclude the Appellees for the benefit of their Virginia based competitors. This classification cannot be sustained; the statute deprives Appellees of the equal protection of the laws.

B. The nonresident statute (Section 28.1-60) has no legitimate purpose or reasonable basis.

Virginia Code § 28.1-60 denies nonresidents the right to take menhaden in the Chesapeake Bay, thereby reserving

solely to residents of Virginia the exclusive right to fish in that area.

The validity of the discrimination practiced by the statute must be judged according to the standard established by this Court in *Toomer* v. *Witsell,* 334 U.S. 385 (1948).

In *Toomer,* nonresidents challenged a South Carolina statute which imposed a license fee on shrimp boats owned by nonresidents to be used in the state's coastal waters which was one hundred times the fee assessed residents' boats. The Court noted that the differential had the practical effect of virtually excluding nonresidents' boats. Thus, the impact on nonresidents was nearly identical to that of the Virginia statute. In finding the legislation unconstitutional under the Privileges and Immunities Clause, the Court employed an analysis equally applicable under the Equal Protection Clause:

> "It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with *whether such reasons do exist and whether the degree of discrimination bears a close relation to them.*" 334 U.S. at 396 (emphasis added).

The standard thus requires both a substantial reason for classifying nonresidents differently than residents and a degree of discrimination tailored to the differences which the two classes bear to the purpose of the statute.

Assuming that the South Carolina statute was a conservation measure, the Court found the state's argument that the nonresidents constituted "a peculiar source of

evil'', 334 U.S. at 398, wholly conclusory *and* an insufficient reason for excluding rather than regulating more closely those aspects of their operation which threatened the fishery.

> "In this connection appellees mention, without further elucidation, the fishing methods used by non-residents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. . . . Nothing in the record [supports those statements]. . . . But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion.'' 334 U.S. at 398.

Appellant here makes the same argument, alleging solely on the strength of his own hypothesis that nonresidents are "a peculiar source of evil'' because of the state's claimed inability to enforce its net mesh size regulations against them. In *Toomer,* the Court pointed to the state's undoubted power to regulate the nonresidents' fishing practices and assess them a license fee compensating the state for any added cost of enforcing its laws as to their boats. It concluded in language appropriate to the present controversy:

> "We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the dangers represented by non-citizens, as a class, and the severe discrimination practiced upon them.'' 334 U.S. at 399.

Appellant's hypothesis that a nonresident commercial menhaden fisher is "less likely'' than a resident to comply voluntarily with state conservation measures is wholly unsupported by the record. Moreover, it is clearly inapplicable to the menhaden industry which is dominated by three national corporate fisheries, Seacoast, Zapata and Standard, two of which happen to have operations in Virginia. All

three are dependent on the survival of the resource in commercial quantities, in Virginia and elsewhere.

Appellant also argues that Virginia's ownership of the menhaden in the Chesapeake Bay gives it the right to reserve that fishery for residents under the authority of *McCready* v. *Virginia,* 94 U.S. 391 (1877). The Court held in *McCready* that a state may preclude nonresidents from planting oysters in the tidal waters of a stream because of its sovereign ownership of such waters and because the right in question was "a property right and not a mere privilege or immunity of citizenship.'' 94 U.S. at 395.

Appellant would have this Court equate the stream in *McCready* to the Chesapeake Bay, a body of water having a width in places of thirty miles, and equate planted oysters affixed to a river bed to free-swimming, migratory menhaden for purposes of determining the applicable law. This Court has unqualifiedly rejected any extension of *McCready* to migratory fish. The South Carolina statute invalidated in *Toomer* regulated fishing for shrimp, which are like menhaden in that they are free-swimming and migratory. In *Toomer,* the Court distinguished *McCready* and stated:

> "First, the *McCready* case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily.'' 334 U.S. at 401.

Appellant also argues that *Toomer* is distinguishable since South Carolina's claim of ownership of shrimp in its coastal waters was considered questionable while Virginia's ownership of menhaden in inland waters such as the Chesapeake Bay is certain. Contrary to this contention, the Court in *Toomer* pursued two independent arguments and

concluded in each that *McCready* should not be extended. In one argument the Court accepted the state's ownership but found it insufficient.

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States." 334 U.S. at 402.

In *Edwards* v. *Leaver,* 102 F. Supp. 698 (D. R. I. 1952), a Rhode Island statute prohibiting nonresidents from taking menhaden in certain portions of the State's territorial waters, including Narragansett Bay and the Sakonnet River was held unconstitutional under the standard established in *Toomer.* The Court expressly rejected the argument made by Appellant here, that menhaden are analogous to oysters for the purpose of determining the degree of state ownership and that *Toomer* has no application to fish in inland waters. The Court stated:

> "Menhaden are free-swimming fish and as was pointed out in the *Toomer* opinion, the case of *McCready* v. *State of Virginia* . . . is clearly distinguishable on that fact.
>
> In view of the discriminatory character of this statute, we do not regard as important the fact that the area designated by the statute may be regarded as inland waters. The important fact is that menhaden are migratory fish. We hold, in accordance with the ruling of the *Toomer* case, that menhaden fishing in the designated area is within the purview of the privileges and immunities clause." 102 F.Supp. at 703.*

* Subsequent to *Toomer* this Court again rejected the applicability of the sovereign ownership theory to free-swimming fish in *Takahaski* v. *Fish and Game Commission,* 334 U.S. 410, 420-421 (1948).

In two recent Rhode Island decisions, Appellees obtained a temporary injunction against enforcement of a regulation which would have banned all vessels over 90 feet in length from catching menhaden in that state, *Apel* v. *Murphy,* Civ. Act. No. 75-210 (D.R.I. June 30, 1976), and obtained summary judgment invalidating a statute which prohibited nonresidents from taking fish from Rhode Island waters for the purpose of carrying them out of that state by boat, *Apel* v. *Murphy,* Civ. Act. No. 75-114 (D.R.I. July 28, 1976). In No. 75-210 the Court noted that all of Seacoast's vessels would be excluded since they exceed 90 feet in length but all Rhode Island based menhaden fishing vessels could comply with the regulation. In No. 75-114 all menhaden fishermen would be required to land in Rhode Island all their menhaden caught in Rhode Island, a state where Seacoast has no plant. In both cases the Rhode Island three-judge Court relied on *Toomer* v. *Witsell,* 334 U.S. 385 (1948), in granting the injunctions sought by Seacoast. The situation here with the Virginia statutes is clearly parallel and should compel the same result.

Moreover, this Court subsequently rejected the right-privilege dichotomy upon which *McCready* turned. The basis for the decision in *McCready* was that the planting of oysters in tidal waters owned by a state was considered a property right rather than a mere privilege. In *Graham* v. *Richardson,* 403 U.S. 365 (1971), the Court refused to recognize another "special public interest" of a state as an exception to the Equal Protection Clause and noted that the Court had rejected the right-privilege distinction.

> "Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahaski,* we conclude that [it is inadequate here]. First, the special public-interest doctrine was heavily grounded on the notion that '[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship.' *But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'* " 403 U.S. at 374 (citations omitted; emphasis added).

Other residency statutes such as Section 28.1-60 uniformly have been held unconstitutional under the Privileges and Immunities Clause and the Equal Protection Clause. *Brown* v. *Anderson,* 202 F. Supp. 96, 101-102 (D. Alaska 1962); *Russo* v. *Reed,* 93 F. Supp. 554, 559-561 (D. Me. 1950); *Gospodonovich* v. *Clements,* 108 F. Supp. 234, 236-237 (E.D. La. 1951), *appeal dismissed,* 344 U.S. 911 (1953); *Commonwealth* v. *Westcott,* 344 N.E.2d 411, 412-413 (Mass. 1976), *cert. filed,* No. 75-1775 (June 7, 1976). State license fee legislation which discriminated without reason between residents and nonresidents was struck down in *Mullaney* v. *Anderson,* 342 U.S. 415, 417-418 (1952), and in *Steed* v. *Dodgen,* 85 F. Supp. 956, 958 (W.D. Texas 1949).

The Appellant has failed to demonstrate any valid reason for prohibiting nonresident commercial fishermen from pursuing menhaden on their migratory route through the Chesapeake. The purpose of the Virginia residence statute was simply to obtain and preserve an economic advantage for residents who obviously have more influence at the state legislature than their nonresident competitors. This effort to exclude competition is no justification for the denial of Appellees' rights to equal protection of the laws.

Appellant Douglas, Commissioner of Marine Resources, testified at his deposition that he did not know why nonresidents were barred from catching menhaden in Chesapeake Bay. (App. 66) However, Appellant now argues "Enforcement of the statute regulating net mesh size is virtually impossible as to non-resident fishermen since they do not land catches at Virginia ports. Dockside enforcement of the net regulations is the only effective method of enforcement."* Brief of Appellant, at 10.

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* VIRGINIA CODE § 28.1-65 makes it unlawful to use a net with a stretched mesh of less than one and three quarter inches. Other states also regulate net mesh size. (App. 99)

This contention falls far short of showing a reasonable basis for the discrimination. It should be evaluated in light of the following:

1. There is no requirement of dockside examination for net mesh size in any Virginia statute or regulation.

2. No proof was offered in the depositions or otherwise as to the alleged importance of dockside examination of net mesh size or that it even exists in practice.

3. In any event dockside enforcement would be meaningless because a Virginia corporation qualifying as a resident is not required to land its catch in Virginia but can take the catch to any plant outside of Virginia. As has been noted, *supra* p. 10, the major Virginia companies in the menhaden industry, namely Zapata and Standard, have a number of plants in states other than Virginia, including the neighboring states of Maryland and North Carolina.

4. Dockside inspection also would be meaningless as to net mesh size, because the Virginia statute makes illegal the "use," not the possession or ownership of stretched net meshes of less than one and three quarters inches. It does not even treat possession or ownership as prima-facie evidence of use.

5. It is commonly known that Virginia and other coastal states have small boats patrolling their coastal waters. The highly visible menhaden fishing fleet can be checked while their purse seines are in the water, just as oyster and crab fishermen are checked while fishing.

6. The net mesh size restriction as to menhaden originated in 1926 (Laws of Virginia, Acts of Assembly 1926, page 249) long after nonresidents had been excluded from fishing in Virginia waters.

In short, there is simply no relationship between prohibiting the catch of the smallest menhaden and the prohibition against fishing by nonresidents.*

It is clear that the Virginia statute preventing nonresidents from fishing in Chesapeake Bay has neither a legitimate purpose nor a rational basis. The classification is discriminatory and unconstitutional as found by the Court below.

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* The impropriety of the Virginia legislation preventing nonresidents from fishing in Chesapeake Bay also appears from the national standards for fishery conservation set forth in the Fishery Conservation and Management Act of 1976. Section 301 (16 U.S.C. § 1851) provides in part:

> "(a) IN GENERAL—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and managment:
>
> * * *
>
> (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges."

Although the foregoing standards are national standards specifically applicable *inter alia* to the fishery conservation zone, the principles as to the nature of appropriate management and conservation measures should be equally applicable to the three mile belt. Thus, any fishery management plan with respect to any fishery may "incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery," Section 303 (b)(5) of the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1853 (b)(5).

The report of the Senate Committee on Commerce on an earlier form of the Fishery Conservation and Management Act of 1976 stated, in part, with reference to the foregoing national standards:

> ". . . when allocation becomes necessary, it must be done judiciously and carefully to prevent discrimination or bias. Since there will be pressures on State representatives to protect the residents of their home State, nothing will destroy the effectiveness of this new management program than if one State, or group of States, attempts to favor their own residents to the detriment of others. If, for example, the most efficient area to catch fish during their migration is near the coast of Rhode Island, New Jersey fishermen should be allowed an equitable portion of the catch if they also fish the same stock." *S. Rep. No. 94-416, 94th Cong., 1st Sess., at 30.*

III

A State's Refusal to Grant a License to Take Fish in Local Waters to Classes of Persons Engaged in Interstate Commerce in Menhaden Constitutes an Unlawful Discrimination against Interstate Commerce.

Sections 28.1-81.1 and 28.1-60 of the VIRGINIA CODE (1950), as amended, deny Appellees the right to carry on the menhaden fishery in the Virginia marginal sea and the Chesapeake Bay, an important source of the menhaden fishery, solely on the basis of their ultimate alien control and nonresidence.

Menhaden constitute the largest fishery in the United States, contributing approximately 45 per cent of the annual aggregate commercial catch of United States fishermen. (App. 99)* Fishing for menhaden is commercially feasible only during their summer migration, when they move close to shore and through the contiguous inland waters of the coastal states. During that period they travel in large, closely-packed schools which the fishers pursue from state to state. Almost all menhaden are harvested within three miles of the coast. U.S. DEPT. OF COMMERCE, FISHERIES OF THE UNITED STATES, 1975, CURRENT FISHERIES STATISTICS No. 6900 (1976), at 18.

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* The interstate migratory character and commercial value of menhaden are discussed in Appellees' Statement of the Case.

Seacoast both fishes for and processes menhaden; Oceanic and Smith Meal furnish their catch to Seacoast for processing. The vessels operate from Seacoast's plants located in Port Monmouth, New Jersey, and Morgan City, Abbeville and Cameran, Louisiana. Seacoast also owns and operates terminals for fish meal in Delaware and Texas and a shipyard for repair of vessels in Louisiana. Thus, Appellees clearly are engaged in interstate commerce.

Appellant argues that §§ 28.1-81.1 and 28.1-60 do not impede such commerce in menhaden — they merely "regulate" the "local incident" by prohibiting Appellees from taking the fish. Thus, Appellant attempts to gloss over the fact that the classifications made by the two Virgina statutes effect a practical exclusion of an out-of-state competitor of local interests from the commerce of menhaden insofar as that commerce is dependent upon conducting a local activity.

Appellees have no quarrel with the decisions of this Court cited by Appellant to support the Virginia statutes. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), and *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960), upheld *even-handed* local regulations not discriminatory against a class engaged in interstate commerce; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), invalidated a regulation as applied to interstate railroads because it placed an undue burden on interstate commerce. These cases are of no help to Appellant.

In *Nippert* v. *Richmond,* 327 U.S. 416 (1945), the Court invalidated a fixed sum license tax upon the privilege of engaging in the business of solicitation as applied to representatives of a foreign corporation where, although the solicitation was local, the goods were to be shipped interstate. Responding to just the "local incident" argument made here by Appellant, the Court stated:

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax." 327 U.S. at 423.

The court in *Nippert* proceeded to evaluate the impact of the tax upon out-of-state solicitors as follows:

> "... [T]he Richmond tax imposes substantial excluding and discriminatory effects of its own. As has been said the small operator particularly and more especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, *with the result that the commerce is stopped before it is begun.*" 327 U.S. at 429 (emphasis added).

See *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 70, 72 (1963).

Far more clearly than the statute struck down in *Nippert,* the Virginia statutes prohibit certain classes of persons engaged in interstate commerce from performing an essential local function in the pursuit of such commerce. It is no argument that the act prohibited is local since the prohibition is of interstate commerce itself insofar as conducted by Appellees in the State of Virginia. The effectiveness of the Virginia statutes in protecting local economic interests from competition demands their invalidation.

> "Provincial interests and local political power are at their maximum weight in bringing about acceptance of

this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against." 327 U.S. at 434.

Economic protectionism in the guise of conservation has never been sustained by this Court where its focus was interstate. See *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923).

In *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911), invalidating on Commerce Clause grounds an Oklahoma statute designed to reserve for local consumers natural gas produced within the State, the Court stressed the balkanization which such legislation would produce:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such a power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' " 221 U.S. at 255.

In *H. P. Hood & Sons* v. *Du Mond,* 336 U.S. 525 (1949), the Court held invalid as applied a New York statute authorizing the denial of a license to purchase milk upon an administrative determination that the granting of such license would be destructive of competition or would not otherwise be in the public interest. Plaintiff, a foreign corporation, distributed milk in Boston and was licensed in New York to operate three receiving depots for the

purpose of purchasing milk. Its application for a license to operate a fourth depot was denied.

The Court carefully distinguished the states' reserved power to regulate their internal commerce for the purpose of protecting public health, safety and welfare from the superior power lodged exclusively in the Federal government to regulate the interstate character of the economies of the several states.

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *Seelig,* 294 U.S. 541, 527, [sic] 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." 336 U.S. at 537-538.

The ultimate extension of the statute struck down in *H. P. Hood & Sons* is present in §§ 28.1-81.1 and 28.1-60 of the VIRGINIA CODE (1950), as amended, by which Appellant would "regulate" its fishery through the exclusion of Appellees. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928), involved such legislation. There, a statute which effectively precluded nonresident individuals and corporations from engaging in the taking of shrimp from Louisiana waters or participating in the canning and packing of the tail meat of the shrimp and the manufacture into fertilizer of the raw shells, hulls and heads was held unconstitutional.

Considering the contention that the legislation was validly enacted under the state's power to regulate and control

its fisheries, the Court accepted the proposition developed in *Geer* v. *Connecticut*, 161 U.S. 519 (1896), that the state owned, in its soverign capacity, the shrimp found in its waters. It held, however, that in permitting its own citizens to harvest, process and transport interstate the shrimp found in its inland and coastal waters, the fish had been released from the trust in which the state held them and thus had become the subject of interstate commerce.

> "In determining what is interstate commerce, courts look to practical considerations and the established course of business. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid." 278 U.S. at 10 (citations omitted).

The Virginia statutes restrict the economic benefits of the menhaden resource to some classes of interstate fishers and withhold it from other classes. In allowing the menhaden found in its waters to become the subject of interstate commerce, the state is prohibited by the Commerce Clause from discriminating among the interstate harvesters. As to those excluded from Virginia's fishery, the Virginia statutes constitute an attempt to halt interstate commerce before it has begun. *Nippert* v. *Richmond*, 327 U.S. 416 (1945); *Foster-Fountain Packing Co.*

Appellant cites *Toomer* v. *Witsell*, 334 U.S. 385 (1948), for the proposition that a state may prohibit the taking of its fish by certain classes of persons engaged in the interstate menhaden industry for the reason that such taking is a local incident. If that were the Court's holding, such would stand in stark contrast to the cases discussed above. However, in declaring unconstitutional the provision requiring

those taking shrimp to dock, unload, pack and place a tax stamp on their catch, the Court stated:

> "The record shows that a high proportion of the shrimp caught in the waters along the South Carolina coast, both by Appellants and others, is shipped in interstate commerce. There was also uncontradicted evidence that Appellants' costs would be materially increased by the necessity of having their shrimp unloaded and unpacked in South Carolina ports rather than at their home bases in Georgia. . . . In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fisherman, is to divert to South Carolina employment and business which might otherwise go to Georgia; *the necessary tendency of the statute is to impose an artificial rigidity on the economic patterns of the industry.*" 334 U.S. at 403-404 (emphasis added).

The Court's holdings and reasoning in *Foster-Fountain Packing Co.* and *Toomer* place beyond dispute the proposition that Appellees are entitled to take menhaden in Virginia waters on an equal basis with those defined by that state as residents and citizens. State regulation of fish is not excepted from the scope of the Commerce Clause. Since the necessary effect of the Virginia statutes is to reserve the exploitation of the menhaden resources to local interests at the expense of Appellees as interstate harvesters and processors of menhaden, thus redefining the industry along state boundaries, the legislation is unconstitutional.*

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* See also *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1969); *Anderson* v. *Mullaney*, 191 F.2d 123 (9th Cir. 1951), *aff'd on other grounds*, 342 U.S. 415 (1952); *Seacoast Products* v. *Gormley, Civ. Act. No. 15796* (D. Conn. 1974); *Apel* v. *Murphy, Civ. Act. No. 75-210* (D.R.I. June 30, 1976); *Apel* v. *Murphy, Civ. Act. No. 75-114* (D.R.I. July 28, 1976).

IV

A Federal Court May Not Abstain from a Decision Where a State Statute Challenged as Unconstitutional Is Unambiguous and Federal Claims, Therefore, Do Not Turn upon an Unresolved Question of State Law.

In *Zwickler* v. *Koota,* 389 U.S. 241 (1967), the Court reviewed the doctrine of abstention in light of the purpose of the nineteenth century expansion of original federal judicial jurisdiction by Congress and the corresponding duty imposed on federal courts.

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility [to protect Constitutional rights]." 389 U.S. at 248.

In view of the statutory duty, the Court reasoned:

> "The judge-made doctrine of abstention . . . sanctions [abstention] only in narrowly limited 'special circumstances.' " 389 U.S. at 248 (citations omitted).

Those "special circumstances" were defined by the Court in *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971).

> "But the abstention rule only applies where 'the issue of state law is uncertain.' *Harman* v. *Forssenius,* 380 U.S. 528, 534. Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. *Reetz* v. *Bozanich, supra; City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U.S. 639." 400 U.S. at 438-439.

Considering the application of that doctrine to the statute before it, the Court concluded in language appropriate to the Virginia statutes in controversy here:

> "The Act on its face gives the chief of police the power to do what he did to the appellee. Hence the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in *Zwickler* v. *Koota,* 389 U.S. 241, 251, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court." 400 U.S. at 439.

Similarly, Appellees maintain that §§ 28.1-81.1 and 28.1-60(3) are unconstitutional on their face. Those statutes authorize Appellant to deny Appellees the right to fish in state territorial waters solely on the basis of alienage and nonresidence.

Appellees' challenge in a Federal court to unambiguous state statutes does not present an appropriate occasion for that court to abstain from decision.

> "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal court should stay its hand. . . ." *Wisconsin,* 400 U.S. at 439 (citation omitted).

CONCLUSION

Virginia cannot take away rights granted under Federal law. Appellees' vessels are duly enrolled in the U.S. fishery under the U.S. flag. They are subject to proper state conservation measures uniformly applied to all, but they may not be excluded from Virginia waters because

of alienage or nonresidence. The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John J. Loflin, Jr., a member of the Bar of the Supreme Court of the United States and one of the counsel for Appellees, in the above-captioned matter, hereby certify that three (3) copies of this Brief of Appellees have been served upon each counsel of record for the parties herein by depositing the same in the United States Postal Office with first class postage prepaid, this 20th day of August, 1976, as follows:

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FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
Appellant,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC., AND
SECOND OCEANIC CORPORATION,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC., AND
SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF FOR THE APPELLANT

ARGUMENT

I.

Virginia Code Sections 28.1-60 And 28.1-81.1 Are Not Preempted By The Bartlett Act, Federal Vessel Enrollment And Licensing Statutes, Or Any Comprehensive Federal Legislative Scheme Nor Do The Virginia Statutes Intrude Upon The Federal Authority In Foreign Affairs.

A. THE BARTLETT ACT DOES NOT PREEMPT STATE JURISDICTION TO LICENSE FISHING BY VESSELS OF THE UNITED STATES WITHIN THE TERRITORIAL SEA.

The three judge federal court below held that Virginia Code Section 28.1-81.1 had been preempted by the Bartlett Act. (16 U.S.C. § 1081 *et seq.*) The Court stated that "in

our judgment, this legislation [16 U.S.C. § 1081 *et seq.*] preempted Virginia's control of commercial sea fisheries and superseded the state's regulation of them." Virginia, as well as Delaware, Maryland, New York, Maine, New Hampshire, Rhode Island and Massachusetts, strongly contest this view. The United States, in its brief requested by this Court, also disagrees with the lower court as to this matter. The Bartlett Act clearly applies only to *foreign flag vessels,* prohibiting their fishing within the United States exclusive fishery zone, formerly 12 miles, now extended to 200 miles. Since the Virginia statutes involved here are applied to *United States flag vessels,* the Bartlett Act in no way preempts their operation. *Huron-Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960). Even the Appellees (Seacoast), no longer contend that the Bartlett Act alone preempts the power of states to license fishing in state territorial waters. The lower court should therefore be reversed as to this point.

Although it was not addressed in the opinion of the lower court from which this appeal was taken, Seacoast would now have this Court consider a preemption argument relying on two new theories, which will be treated in the following paragraphs B and C.

B. Federal Vessel Enrollment And Licensing Statutes (46 U.S.C. §§ 251, 263) Do Not Preempt Virginia Code Sections 28.1-60 And 28.1-81.1.

Seacoast contends that by virtue of the enrollment and licensing of its vessels as United States vessels, under 46 U.S.C. §§ 251 and 263, they are authorized to take fish in the waters of any state, and that Virginia Code §§ 28.1-60 and 28.1-81.1, which would prevent Seacoast's harvesting of fish from Virginia waters, are preempted by force of the

federal enrollment and licensing statutes. The United States, in its Brief, has taken essentially the same position.

This Court has on several occasions firmly rejected the notion that federal enrollment and licensing of fishing vessels preempts operation of state fisheries laws against vessels so licensed. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Smith* v. *Maryland,* 18 How. 71 (1855). The holdings of this Court in *Manchester* and *Smith* leave no doubt that issuance of a federal license has no effect upon application of state fisheries laws to federally licensed vessels. But Seacoast and the United States attempt to distinguish these holdings, asserting that the state laws in *Manchester* and *Smith* did not exclude federally licensed vessels from state fisheries, but instead, merely regulated the manner and means of their taking fish. It is the complete exclusion of federally licensed vessels from state fisheries which is, according to Seacoast and the United States, preempted by issuance of a federal license. The federal license, Seacoast contends, authorizes the taking of fish in the navigable waters of every state, which authorization no state can negate by its laws. The clear holdings in *Manchester* and *Smith,* however, do not support this contention.

Seacoast has attempted to frame the issue as if the Virginia statutes preclude federally licensed vessels from its waters, thus permitting an argument based upon *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). The Virginia statutes being challenged by Seacoast in fact do not exclude any vessels. The right to navigate is unimpaired. Similarly, the right to transport fish or otherwise engage in commerce is unaffected by the Virginia statutes, which relate solely to the taking of fish. Nevertheless, Seacoast and the United States rely upon *Gibbons* for support of their theory that issuance of a federal license confers the right to take fish from state waters and thereby preempts laws such as the

Virginia statutes in question. Examination of the holding in *Gibbons,* however, admits of no such conclusion. In *Gibbons* it was decided that commerce necessarily included navigation in state waters. Following upon that premise, Chief Justice Marshall concluded that issuance of a *license for the coasting trade,* unquestionably a part of commerce, implied an affirmative right to navigate through state waters. Seacoast and the United States contend that, simply because fishing vessels are licensed under the same statute as vessels licensed for the coasting trade, the license for the fisheries must confer a right to take fish in state waters just as the coasting trade license conferred a right to navigate state waters. The syllogism is appealing, but it has no foundation in law.

It was acknowledged in *Gibbons* that whatever rights or authority the federal license could confer must be derived from the power of Congress over commerce. The federal statutes for enrollment and licensing of vessels are clearly founded upon the authority of Congress to regulate commerce. *Wiggins Ferry Co.* v. *City of East St. Louis,* 107 U.S. 365 (1882). Thus, after finding that commerce, including the coasting trade, necessarily included navigation in state waters, it is not surprising that Chief Justice Marshall would conclude that a license for the coasting trade implied authority to navigate state waters. But this Court has never viewed the taking of fish in state waters as a part of interstate commerce. *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). Accordingly, in view of the settled conclusion that commerce does not include taking of fish in state waters, it is not at all logical to contend, as Seacoast and the United States do, that a license authorized by Congress under its commerce authority confers a right to take fish from state waters.

The United States and Seacoast, however, cite *Wickard* v. *Filburn,* 317 U.S. 111, 125 (1942) and *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964), respectively, noting that the power of Congress over commerce reaches broadly and may, in fact, reach local activities which are not themselves a part of interstate commerce but which affect commerce. The question here being preemption, the nub of the issue is whether the federal enactment was *intended* to confer a right to take fish in state waters and preempt state laws to the contrary.

To contend that in 1792-1793 Congress intended, by enactment of the federal vessel enrollment and licensing laws, to confer upon owners of fishing vessels licensed under federal laws a right to take fish from state waters, state laws to the contrary notwithstanding, is to ignore completely the circumstances and history surrounding passage of the federal licensing and enrollment statutes. In *McCready* v. *Virginia,* 94 U.S. 391 (1877) this Court expressed the view that:

> "The principle has long been settled in this Court, that each State owns the beds of all tide-waters within its jurisdiction unless they have been granted away. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Smith* v. *Maryland,* 18 How. 74; *Munford* v. *Wardwell,* 6 Wall. 436; *Weber* v. *Harbor Commissioners,* 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddell,* 16 Pet. 410. *The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its*

> *tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.*" 94 U.S. 391, 394, 395 (Emphasis added).

The established view expressed in *McCready* was, therefore, that the states owned and controlled exclusively their tidal waters and the fisheries therein, subject only to the authority of Congress over *navigation*.

The same view was quoted with unqualified approval by this Court in *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891) in respect to the menhaden fishery of Buzzard's Bay. And in *Geer* v. *Connecticut,* 161 U.S. 519 (1896), this Court spoke of the property rights of the state in game and fish and the right of the state to "withhold or grant" the privilege of taking such resources. 161 U.S. 533.

It is, therefore, evident that in 1792-1793 when the federal vessel enrollment and licensing statutes were enacted, Congress and this Court viewed the game and fisheries within the jurisdiction of the states as property of the states under their exclusive control. The privilege of taking such resources was entirely within the discretion of the states.

The contention by Seacoast and the United States that the 1792 and 1793 enactments conferred upon owners of fishing vessels licensed thereunder the right to take fish from state territorial waters, thereby superseding state laws limiting access thereto, is in direct contradiction with the view expressed in *McCready* and other cases holding that the states owned and exclusively controlled the fisheries within their boundaries.

Preemption is not to be lightly inferred, but is implied only when the act of Congress, fairly interpreted, is in actual conflict with the law of a state. *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 443 (1960). The federal

enrollment and licensing statutes, 46 U.S.C. §§ 251 and 263, fairly interpreted in light of the history surrounding their enactment, are not in conflict with Virginia Code §§ 28.1-60 and 28.1-81.1. Interpreted in light of the commonly held notions regarding state ownership and control of fisheries in 1792-1793, as expressed in *McCready, Manchester,* and *Geer,* the federal enactments cannot be reasonably interpreted to confer upon federally licensed vessels a right to take fish from state waters. The federal enrollment and licensing laws, therefore, do not come into actual conflict with the Virginia laws which limit the right to harvest state fisheries.

Moreover, interpretation of the federal statutes in the manner required by their historical setting does not, as Seacoast contends, render the "license" granted therein meaningless. Section 251, confirms that vessels duly enrolled, pursuant to 46 U.S.C. §§ 252 and 11, and no others, shall be deemed United States vessels, entitled to the "privileges of vessels employed in the coasting trade or fisheries." 46 U.S.C. § 251(a). Section 263 provides a "license for the fisheries" to fishing vessels enrolled. The purposes of the license would include: (1) conferring right to navigate freely in the waters of every state; (2) conferring the benefits attributable to American flag vessels while fishing in international waters, including the benefit of treaties to which the United States is a party; (3) conferring the right to fish within the exclusively federally controlled fishery zone (3-12 miles from the U.S. coast until March 1, 1977 and then 3-200 miles under the 1976 Fisheries Conservation and Management Act); and (4) establishing the character of the vessel as a fishing vessel, as opposed to a coastwise trade vessel, for various purposes, e.g., exemption from vessel inspection laws.

Thus, federal enrollment and licensing of fishing vessels

confers certain valuable rights and privileges, but does not confer the right to take fish from state territorial waters. Virginia's residency and citizenship licensing requirements under §§ 28.1-60 and 28.1-81.1 are, therefore, not preempted by federal licensing and enrollment.

C. There Is No Comprehensive Federal Legislative Scheme That Would Preempt Virginia Code Section 28.1-81.1.

Seacoast contends that various federal enactments, including the enrollment and licensing laws (46 U.S.C. § 11, 252), Sections 9 and 37 of the Shipping Act (46 U.S.C. § 808, 835), the Bartlett Act (16 U.S.C. § 1081) and the Fishery Conservation and Management Act of 1976 (16 U.S.C. §§ 1801-1882) constitute a comprehensive scheme of legislation regulating the "nationality of the owners of U.S. flag fishing vessels," thereby preempting Virginia Code § 28.1-81.1 which excludes foreign-controlled corporations from being licensed to take fish from Virginia waters.

This contention, however, runs afoul of the most basic principle of preemption enunciated by this Court in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960), *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Kelly* v. *Washington,* 302 U.S. 1 (1937), *Mintz* v. *Baldwin,* 289 U.S. 346 (1933), *Savage* v. *Jones,* 225 U.S. 501 (1912) and *Reid* v. *Colorado,* 187 U.S. 137 (1902), to the effect that:

> "Congress having occupied but a limited field, the authority of the state to protect its interests by additional or supplementary legislation otherwise valid is not impaired." 313 U.S. 69, 75.

In short, the Virginia statute in question (Va. Code § 28.1-81.1) does not purport to deal with, nor does it, in fact, deal with the same matters which are the concerns of the array of federal statutes cited by Seacoast as preemptive. Virginia

Code § 28.1-81.1 deals with licensing to take fish in Virginia waters and makes ineligible for licenses foreign-controlled corporations. None of the federal enactments relied on as preemptive deals with the same subject.

Sections 252 and 11 of the Shipping Act (46 U.S.C. §§ 252, 11) establish the requirements for obtaining American flag status for vessels to be licensed (46 U.S.C. § 263) for the coastwise trade or fisheries. Seacoast has argued that the "license" provided for under 46 U.S.C. § 263 grants to its holder a right to fish in every state's waters, thus preempting Virginia's laws preventing non-resident and foreign-controlled corporations from fishing in Virginia. This contention we have shown to be erroneous (I. B). Now Seacoast argues that 46 U.S.C. §§ 252 and 11, which merely establish the requirements for enrollment or American flag status, a prerequisite for the license under 46 U.S.C. § 263, preempt the Virginia laws. The enrollment statutes (46 U.S.C. §§ 252, 11), insofar as fisheries are concerned, relate solely to the vessel itself, providing the requirements for obtaining the characterization as an American flag vessel. The reach of these laws, by their express terms, ends with the establishment of the vessel's American flag status. Sections 252 and 11 in no wise confer any authority to engage in fishing in state waters. Compliance with 46 U.S.C. §§ 252 and 11 merely enables a vessel owner to apply for a license under 46 U.S.C. § 263, which license itself we have shown, confers no right to fish in state waters. Thus, the enrollment requirements established under 46 U.S.C. §§ 252 and 11 clearly do not address the matter of taking fish from state waters, a matter left to the states, but instead relate solely to the documentation of vessels as American flag vessels.[1]

[1] We find great difficulty in understanding how the documentation laws do not, in fact, weigh heavily against Seacoast's theory of preemption. Pursuant to 46 U.S.C. §§ 252 and 11 vessels to be enrolled as

The enrollment laws, therefore, do not preempt Virginia Code § 28.1-81.1.

Sections 9 and 37 of the Shipping Act (46 U.S.C. §§ 808, 835) establish a requirement of federal approval of any transfer of United States enrolled and licensed vessels to foreign interests. The question of transferring United States vessels to foreign ownership under the Shipping Act (46 U.S.C. §§ 808, 835) has nothing to do with the right to take fish in Virginia waters governed by the state law in question here. Seacoast, nevertheless places great reliance upon the issuance of vessel transfer orders under Sections 9 and 37 of the Shipping Act. Hundreds of such transfers are approved annually, usually to allow American vessels to be sold to foreign owners for redesignation as foreign flag vessels. American flag fishing vessels sold to foreign controlled U.S. corporations that wish to retain such vessels in the American fisheries must also be approved. As administered, such transfers of fishing vessels are absolutely routine, usually without public hearings. From Fiscal 1971 through Fiscal 1976 the Maritime Administration of the Department of Commerce approved the sale of 132 fishing vessels from the

American flag vessels in the *coastwise trade* must be 75% owned by United States citizens. This requirement is made express by the Congress under 46 U.S.C. § 11. Yet 46 U.S.C. § 11 is silent regarding foreign ownership of corporations owning vessels enrolled as U.S. flag *fishing vessels*. Thus, while we contend that the matters dealt with under 46 U.S.C. §§ 252 and 11 are entirely different from the matter of taking of fish in state waters addressed by the Virginia laws, 46 U.S.C. §§ 252 and 11 are silent regarding foreign ownership of fishing vessels, thereby leaving the matter free of Congressional regulation. Preemption, therefore, cannot occur until Congress has acted to regulate foreign ownership of fishing vessels under 46 U.S.C. §§ 252 and 11. But in any event, even if 46 U.S.C. §§ 252 and 11 did address foreign ownership of corporations owning U.S. documented vessels, such laws would not preempt the Virginia law, dealing with licensing to take fish in state waters, a matter entirely separate from vessel documentation.

United States citizens to foreign interests wishing to retain the United States flag. No transfer requests were rejected. Except in one case involving the posting of a bond by owners of a tuna boat conditioned upon the vessel being used in compliance with U.S. law, no conditions were ever imposed on any such fishing vessel transfers.

On September 8, 1976 a hearing was conducted before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, of the Committee on Merchant Marine and Fisheries of the United States House of Representatives (hereinafter called the "Hearing"); it inquired into the existence and extent of Federal governmental controls affecting the entry of foreign controlled corporations into the American fisheries.[2] The Congressional hearings indicated that the Maritime Administration views the controls imposed by Sections 9 and 37 of the Shipping Act (16 U.S.C. §§ 808, 835) almost exclusively in a national defense and national security context.[3] The Maritime Administration indicated that applications for transfer of fishing vessels pursuant to Sections 808 and 835 were referred for comment to three other governmental agencies, which

[2] House of Representatives, Hearing Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, 94th Congress, "Two Hundred Mile Fisheries Zone and Joint Ventures," Committee Serial No. 94-44 (Sept. 8, 1976).

[3] See page 186 of the hearing report where Mr. Garske, representing the Maritime Administration, states the following: "May I say something else about the basic purpose as we understand it of these statutes, of sections 808 and 835? Basically, they were enacted during—before, during and after the First World War and were addressed to national security, national defense, the protection of the existing U.S. flag merchant marine, and essentially that is the way the Maritime Administration has looked at them. I just wanted to indicate that that has been viewed as the basic purpose—national defense and national security."

almost invariably did not render an objection to the transfer.[4]

In response to a request from the Subcommittee for a statement on policy regarding fishing vessel transfers, the Maritime Administration responded (hearing report, p. ~~90~~ 188) as follows:

> "Ordinarily any vessel under 3,000 gross tons will be approved for transfer without condition if it is not needed for reasons of national defense and the foreign buyer and country of registry are acceptable. 46 C.F.R. 221-Appendix. Essentially, all vessels typically considered to be fishing vessels are under 3,000 gross tons."

As to new vessels constructed in United States yards, there is a blanket waiver in effect, resulting in automatic approvals by the Maritime Administration. (hearing report, p. 93). Therefore, a Department of Commerce clearance to enable a non-citizen (within the definition of the Shipping Act) to acquire a U.S. flag vessel, whether an existing vessel from a U.S. citizen or a new vessel by construction in a U.S. yard, is obtainable with little case by case analysis. In all events, the transfer orders under 46 U.S.C. §§ 808, 835 merely authorize a change of vessel ownership, and do not grant an affirmative right to fish in state waters in contra-

[4] See pages 186-187 of the hearing report, where the following exchange is reported: "Mr. Mannina: What happens if one of those three agencies recommends that you not approve the transfer? What does the Maritime Administration do? Mr. Garske: Well, I might say that there have been very few cases where these agencies have not recommended approval, or at least have not given a 'no objection.' As a general proposition I think where there was some objection or some question, it was not an absolute type of thing. In other words, it was worked out in some way. If, however, as you pose the question, if there was a very definite unconditional objection, then Maritime—and I am really hypothesizing now, I don't know, we have had a case like this —but in any event— Mr. AuCoin: May I interrupt for a moment? Did I understand you to say there has never been a case of that kind? Mr. Garske: I don't know. Mr. AuCoin: You can't recall a case of that kind? Mr. Garske: If there has been, they are very few."

vention of state laws such as the two Virginia laws here in question.

Similarly, the provisions of the Bartlett Act, 16 U.S.C. § 1081, do not conflict in any manner with the Virginia statute. The Bartlett Act prohibits fishing by *foreign flag vessels* (vessels not enrolled and licensed under United States enrollment and licensing laws) inside twelve miles of the United States coasts. As we have previously explained more fully (Brief of Appellant, p. 13) Virginia Code § 28.1-81.1 is applied in this case to bar from Virginia waters Seacoast's *United States flag vessels*. Since the Bartlett Act clearly applies only to *foreign flag vessels* (See Brief of United States, pp. 22-23) and the Virginia statute applies here to *United States flag vessels* (enrolled and licensced) owned by Seacoast, there can be no conflict requiring a finding of preemption.

For the same reason, the Fishery Conservation and Management Act of 1976 (effective March 1, 1977) can have no preemptive effect upon Virginia Code § 28.1-81.1. Section 307 of that Act (16 U.S.C. § 1857), relied upon as preemptive, prohibits *foreign flag vessels* from fishing within the new 200 mile U.S. fishery zone. The federal Act, therefore, having application only to *foreign flag vessels* cannot conflict with the application here of Virginia Code § 28.1-81.1 to Seacoast's *United States flag vessels*. Preemption of Virginia Code § 28.1-81.1 is not, therefore, demanded. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960).

Accordingly, the various federal statutes which Seacoast contends establish a comprehensive scheme of regulation preempting Virginia Code § 28.1-81.1 deal with matters entirely apart from those regulated by the aforementioned Virginia provision. Virginia, by enactment of § 28.1-81.1, makes no attempt to control the nationality of owners of

vessels seeking federal enrollment and licensing (46 U.S.C. §§ 252, 11) nor do they seek to regulate transfer of United States vessels to foreign interests (46 U.S.C. §§ 808, 835). It is equally clear that Virginia Code § 28.1-81.1, making Seacoast ineligible to take fish in Virginia waters with *United States flag vessels*, in no way conflicts with the Bartlett Act or Section 307 of the Fishery Conservation and Management Act of 1976 which regulate only *foreign flag vessels*. Virginia Code § 28.1-81.1 is not, therefore, preempted by the federal statutes relied upon by Seacoast.

D. Virginia Code Section 28.1-81.1 Does Not Intrude Upon The Federal Authority In Foreign Affairs.

The suggestion by Seacoast that Virginia Code § 28.1-81.1, excluding foreign-controlled corporations from Virginia's fisheries, interferes with the United States' prosecution of foreign policy requires only brief comment.

It should be noted at the outset that the United States has in its Brief made no objection to the Virginia law in question based upon foreign policy considerations. If such an interest or policy of the United States was jeopardized by the law in question certainly the United States would forcefully assert its objection.

The authorities cited by Seacoast to support the contention that the Virginia law under consideration intrudes upon federal authority in foreign affairs are entirely inapplicable to the Virginia statute. Virginia Code § 28.1-81.1 does not require the "minute inquiries concerning the actual administration of foreign law," or inquiry into "the credibility of foreign diplomatic statements" found objectionable in *Zschernig* v. *Miller,* 389 U.S. 429 (1968). Nor does the Virginia law lend itself to controversy which would require the state courts to adjudge the nationalization orders of a

foreign state or interfere in United States recognition of any foreign nation, all of which was involved in *United States* v. *Pink,* 315 U.S. 203 (1942). Accordingly, the claim that Virginia Code § 28.1-81.1 intrudes upon the federal domain in foreign affairs is without factual foundation and lacks support of any comparable precedent.

Further, the Virginia statute under consideration in this case is premised upon the same experience and findings which underlie the Fishery Conservation and Management Act of 1976 (16 U.S.C. § 1801 et seq.)—that foreign fishing interests have contributed largely to the rapid depletion of American fishery stocks. (Brief of Appellant, pp. 24-25). The Virginia statute, therefore, is in harmony with current federal policy and law regarding access of foreign fishing interests to American fisheries.

II.

Virginia Code Section 28.1-60 As Applied To The Appellees Does Not Present An Issue Of Equal Protection Of The Laws. Virginia Code Section 28.1-60 Is Reasonably Related To A Legitimate State Interest In Conserving Fisheries And Is Therefore Permissible Under The Fourteenth Amendment.

A. The Appellees Are Foreign-Controlled Corporations And As Such Are Not Entitled To Claim The Benefits Of The Equal Protection Clause Of The Fourteenth Amendment.

This Court has held that corporations formed by United States citizens are "persons" within the intendment of the Equal Protection Clause of the Fourteenth Amendment. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936), *Pembina Mining Co.* v. *Pennsylvania,* 125 U.S. 181, 189 (1888). But Seacoast has not cited and we are not aware of any instance wherein this Court has held that the protections of the Equal Protection Clause extended to corpora-

tions owned and controlled by non-resident aliens. Seacoast is wholly owned by Hanson Trust, Ltd. whose stockholders and directors are citizens of the United Kingdom, and therefore, is not in the same position as a corporation owned by United States citizens in asserting claims under the Fourteenth Amendment.

The rationale for application of equal protection guarantees to corporate entities formed by United States citizens was set forth in *Pembina Mining Co.* v. *Pennsylvania,* as follows:

> "Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name . . . ." 125 U.S. 181, 189.

The rationale underlying application of the equal protection guarantees to corporations owned by United States citizens is, apparently, that since the individual corporate owners are clearly protected by the Fourteenth Amendment, the entity representing their association for business purposes should also be protected. But with respect to corporations, such as Seacoast, owned by non-resident alien stockholders, that rationale does not apply. Non-resident aliens have never been afforded Fourteenth Amendment guarantees. Why, then, should corporate entities established and controlled by non-resident aliens be afforded such protections? There is, therefore, no basis upon which a foreign-owned corporation, such as Seacoast, can demand equal protection guarantees under the Fourteenth Amendment.

B. Virginia Code Section 28.1-60 Limiting The Taking Of Menhaden In The Chesapeake Bay To Resident Corporations Is Reasonably Related To Fisheries Conservation And Is Therefore Permissible Under The Fourteenth Amendment.

Even if Seacoast can demand the protections of the Equal Protection Clause, Section 28.1-60 does not contravene such constitutional guarantees.

Contrary to the view expressed by Seacoast, *Toomer* v. *Witsell,* 334 U.S. 385 (1948) is not dispositive or controlling authority in considering the constitutionality of Virginia Code § 28.1-60 under the Equal Protecton Clause of the Fourteenth Amendment. Valid fisheries conservation reasons for Virginia's residency requirement on licenses for taking Chesapeake Bay menhaden have been offered (Brief of Appellant, pp. 32-33) which are clearly distinguishable from those found insufficient in *Toomer.* (Brief of Appellant, pp. 33-34). In addition to promoting conservation of the fragile menhaden fishery, by facilitating enforcement of menhaden net size restrictions (Brief of Appellant, pp. 32-33), the Virginia residency law furthers enforcement of Virginia Code § 28.1-58, prohibiting menhaden fishers from taking more than one percent *food fish* in any menhaden catch. As with net size regulations, the *food fish* catch limitation of § 28.1-58 can be most effectively enforced at dockside. It cannot be disputed that the residency requirement would, therefore, facilitate conservation of edible fish as well as menhaden, since Virginia resident corporations land their catches in Virginia ports within the enforcement jurisdiction of the Virginia Marine Patrol. Non-resident fishers landing catches outside Virginia could escape effective enforcement.

Seacoast challenges the practical justifications offered in defense of the residency law, apparently calling for in depth

statistical evidence that the residency law, in fact, has promoted conservation. While it is submitted that, in fact, the statute does promote conservation, such proof of the statute's effect has never been the standard applied in reviewing state business and economic regulatory laws under the Equal Protection Clause. It has traditionally been sufficient, in justifying such laws, to offer a reasonable basis for the questioned statute which could have motivated the state legislature to enact the law. *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 471 (1970). The Virginia residency law, viewed in the context of related fisheries statutes (§§ 28.1-58 and 28.1-65), can be justified as reasonably related to fisheries conservation.

A second factor which distinguishes this case from *Toomer* is the substantial interest of Virginia in the Chesapeake Bay menhaden fishery contrasted with the, then, highly tenuous nature of South Carolina's interests in the costal shrimp fishery. It is apparent from the recent decisions of this Court reviewing state statutory classifications under the Equal Protection Clause that the final conclusion as to constitutionality depends largely upon a balancing of state interests promoted by the legislation against the interests of those claiming denial of equal protection. *Sosna* v. *Iowa,* 419 U.S. 393 (1975), *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), *Reed* v. *Reed,* 404 U.S. 71 (1971). In *Toomer* South Carolina's assertions of an ownership interest in the waters and fisheries resources of the three-mile coastal belt was effectively disregarded in reviewing the South Carolina statute as a result of the Court's holding the previous term in *United States* v. *California,* 332 U.S. 19 (1947). Having decided in *United States* v. *California* that the United States was the owner of the coastal waters of the United States and the resources therein, South Carolina's interests in those resources was severely diminished. In the present case, the Virginia

statute regulates the State's most valuable fishery, located within the Chesapeake Bay, an inland body of water, which has always been viewed as the subject of state ownership. Virginia's undisputed ownership of the Chesapeake Bay alone distinguishes *Toomer* and is the foundation of the substantial interests of Virginia in its regulatory scheme which were lacking as support for South Carolina's residency restrictions in *Toomer.*

Furthermore, the skepticism expressed in *Toomer* as to South Carolina's ownership of migratory shrimp, relied upon here by Seacoast as applicable to Chesapeake Bay menhaden, has been negated by the enactment of the Submerged Lands Act, 43 U.S.C. §§ 1301, *et seq.* That enactment conferred upon the states ownership and control of all fisheries resources located within state boundaries, irrespective of their sedentary or migratory nature. See 43 U.S.C. § 1301(e).

This Court has not held, as Seacoast implies by reference to *Missouri* v. *Holland,* 252 U.S. 416 (1920), that migratory fish and wildlife are not subject to state ownership. In *Missouri* v. *Holland* it was decided only that state ownership of migratory birds was not sufficient to give states *exclusive* regulatory authority under the Tenth Amendment so as to render unconstitutional a federal treaty regulating such birds. Thus, *Missouri* v. *Holland* does not preclude state ownership of migratory species, but instead merely confirms federal authority to regulate such species under its interstate commerce and treaty-making powers. Since in the present case no federal treaty or regulatory scheme is in conflict with the Virginia statute *Missouri* v. *Holland* is of little relevance. The Submerged Lands Act, however, is relevant and very clearly vests in the states ownership of the fisheries resources, including migratory species, located within their borders. 43 U.S.C. § 1301(e).

The interests Virginia seeks to preserve in its Chesapeake Bay menhaden fishery are, therefore, far more substantial in nature than the interests South Carolina could legitimately assert in respect to the coastal shrimp fishery in *Toomer*. Virginia's interests arise from ownership of a valuable resource, not mere physical proximity as was the case in *Toomer*. At the time *Toomer* was decided, after the holding in *United States* v. *California* and prior to the enactment of the Submerged Lands Act, the federal government could have asserted complete and exclusive authority over the coastal shrimp fishery. South Carolina residents, as well as residents from every other state, could have been denied access to the shrimp fishery by the United States under the holding in *United States* v. *California*. South Carolina's ability to assert any real vested interest in the value of the resources as a source of employment for its citizens, a food source, or a source of revenue was entirely dependent upon federal acquiescence. By contrast, Virginia's ownership of the Chesapeake Bay and the resources found therein gives rise to a true and substantial vested interest in the economic benefits derived from that resource.

Where a state seeks by its laws to regulate economic and business interests this Court has consistently found state laws valid against equal protection challenges where such laws may be justified by some reasonably conceived set of facts. *McGowan* v. *Maryland*, 366 U.S. 420 (1961). Virginia's residency requirement for the taking of menhaden in the Chesapeake Bay can be so justified (See Brief of Appellant, pp. 23-38).

Seacoast has expended great effort in suggesting alternative law enforcement and conservation measures which would avoid the residency requirement of Virginia Code § 28.1-60. But it is clear from numerous holdings of this Court that the Equal Protection Clause does not demand absolute equality, perfect uniformity or complete rather

than partial resolution of legitimate problems under state laws which regulate economic and business matters. As this Court pointedly noted in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970):

> "In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70. 'A statutory classification will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U.S. 420, 426."

We have asserted in the opining Brief, and still maintain, that Virginia's ownership of the Chesapeake Bay and its menhaden resource makes applicable this Court's holding in *McCready* v. *Virginia*, 94 U.S. 391 (1877), which upheld Virginia's residency requirement of the propagation and harvesting of oysters from Virginia tidewaters. The continued vitality of the ownership doctrine was highlighted in Mr. Justice Frankfurter's concurring opinion in *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

Apart from the holding in *McCready*, which created an exception to the Privileges and Immunities Clause based upon state ownership, Virginia's ownership of the Chesapeake Bay menhaden fishery clearly distinguishes this case from *Toomer* by virtue of Virginia's more substantial interests in the fishery regulated. In *Toomer*, perhaps as a result of the view that South Carolina's economic interests in the coastal shrimp fishery were tenuous after *U.S.* v. *California*,

the Court was apparently less inclined to afford the South Carolina statute the usual presumptions of reasonableness given statutes regulating economic and business matters under the Equal Protection Clause. The substantial economic interests Virginia has in respect to its Bay menhaden fishery demands that the state be afforded the latitude traditionally applied in judging state laws regulating substantial state economic interests. *McGowan* v. *Maryland*, 366 U.S. 420 (1961), *Dandridge* v. *Williams*, 397 U.S. 471 (1970). And in no other area of state regulation do the states require greater latitude than in the regulation of natural resources, requiring solutions to problems that are often unique and which involve fragile resources. *Truax* v. *Raich*, 239 U.S. 33 (1915), *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417-420 (1971). Accordingly, Virginia Code § 28.1-60, which has been shown to relate reasonably to a legitimate and substantial state interest in preservation of valuable and fragile natural resources, should be upheld against the equal protection challenges asserted here by Seacoast. The holding of the District Court as to § 28.1-60 should, therefore, be reversed.

III.

Virginia Code Section 28.1-81.1 Does Not Present An Issue Of Equal Protection Of The Laws And In Any Event The Statute Is A Valid Exercise Of State Police Power To Conserve Fisheries And Is Permissible Under the Fourteenth Amendment.

A. Virginia Code Section 28.1-81.1 As Applied To The Appellees Does Not Present An Issue Of Equal Protection Of The Laws.

For the same reasons set forth above in II. A, the Appellees cannot, as foreign-controlled corporations, assert claims based upon the Equal Protection Clause of the Fourteenth Amendment.

B. Virginia Code Section 28.1-81.1 Excluding Foreign-Controlled Corporations Does Not Establish A "Suspect Classification."

Seacoast is denied licenses for Virginia's coastal menhaden fishery under Virginia Code § 28.1-81.1 because it is a *foreign-controlled corporation*. Seacoast's claim that it has been denied equal protection of the law guaranteed by the Fourteenth Amendment, therefore, presents the question of whether the classification of Virginia Code § 28.1-81.1, barring *foreign-controlled corporations* from taking fish from Virginia waters, is a denial of equal protection of the law.

Seacoast asserts that the classification made by § 28.1-81.1 is a "suspect classification," based upon alienage, requiring "close judicial scrutiny" found applicable in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), *In re Griffiths*, 413 U.S. 717 (1973) and *Graham* v. *Richardson*, 403 U.S. 365 (1971). As we have noted more fully in the opening brief (Brief of Appellant, pp. 23-24) "close judicial scrutiny," requiring a showing of "compelling state interests" to justify alienage classifications, has been applied by this Court as the standard of review only when the statutory classification discriminates directly against *individual resident aliens. Sugarman, In re Griffiths, Graham, supra.* It is the individual resident alien who closely resembles the United States citizen under the Equal Protection Clause as a result of the presumptions which might reasonably flow from the immigration and naturalization processes.

In no instance of which we are aware has a statutory classification discriminating against *corporate* entities been treated as a "suspect classification." The presumptions which may logically emanate from federal immigration processes to establish the individual resident alien's nexus with the state and his community do not apply to *corporate*

entities which undergo no socialization process similar to immigration and naturalization.

Seacoast argues, relying upon *Jordan* v. *Tashiro*,[5] 278 U.S. 123 (1928), that the Virginia statute in effect discriminates against the individual aliens who ultimately own Seacoast and that, therefore, a suspect classification is involved. We hasten to point out, however, that the individuals ultimately owning Seacoast are themselves, *non-resident aliens*. The protections of the Fourteenth Amendment have never been extended to *non-resident aliens*. Thus, discrimination against non-resident aliens does not raise any Equal Protection issue, much less the issue of a "suspect classification."

C. Virginia Code Section 28.1-81.1 Is Reasonably Related To A Legitimate State Interest In Conserving Fisheries And Therefore Is Permissible Under The Fourteenth Amendment.

If the exclusion of foreign-controlled corporations from taking fish in Virginia waters presents any equal protection issue at all, it must be resolved by application of usual equal protection standards requiring some reasonable justification. *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

The rationale underlying the enactment of Virginia Code § 28.1-81.1 has been set forth in full in the opening brief (Brief of Appellant, pp. 24-29). It was there noted that foreign fishing interests had, through their predatory fishing methods, drastically depleted American fishery stocks. Virginia has directly experienced the effects of such foreign fishing practices. (Brief of Appellant, p. 26). Contrary to

[5] *Jordan* v. *Tashiro* did not involve an equal protection issue at all but merely held that a treaty conferring benefits on *resident* Japanese aliens should be construed to benefit U.S. corporations formed by *resident* Japanese aliens.

the statement of Seacoast in its brief on the merits (p. 11), the Appellant, Douglas, in response to questions by counsel for Seacoast during depositions did not say that Section 28.1-81.1 was not designed to have a beneficial effect on the fisheries in Virginia or the United States, but said merely that § 28.1-81.1 was not designed to attack the United States problem (App. p. 59). The Commissioner in his depositions gave testimony as to the decline of certain fishery stocks, which had been important to the Virginia fishing industry, after foreign fishing had been directed against such stocks. He further stated that foreign fishing operators failed to abide by regulations imposed upon them by treaty or otherwise, e.g., "using gear that was improper in the area" or "being in an area when they are not supposed to be." (App. p. 51). He expressed concern that disregard for fishing regulations would accompany any foreign-controlled fishing operations into Virginia waters. Alluding to the means by which such foreign operators could enter Virginia waters under the pre-existing Virginia law, Commissioner Douglas stated:

> "There is the ability to buy U.S. vessels already enrolled in the fishery, such as several firms have already done. Mr. Willcox points out there is a procedure whereby they have to be approved somewhere at the Federal level. I think the problem that I personally would see is not vessels, but more of a philosophy and disregard for both law enforcement, which I am charged to enforce, and you must get some voluntary compliance in this game if you are going to effectively enforce your regulations. You have to have people out there who are not totally disregarding what you are trying to do, and if they have vested interest, if it is stock on which they have historically fished, they tend to have that interest, as opposed to the Soviets, or Poles, or foreign efforts that we have been talking about.

> So it seems to me that the problem that I would see, and that this bill, and new law would prevent, is it would prevent this kind of philosophy from coming into waters that have historically been managed by Virginians for Virginians, and have supported Virginians' fishing industry." (App. p. 69).

There can be no doubt that the states have legitimate interest in preserving fisheries stock. *Skiriotes* v. *Florida,* 313 U.S. 69 (1941). That exclusion of foreign fishing interests from harvesting domestic fisheries bears a direct relationship to management and preservation of fisheries stocks cannot be disputed, particularly in light of the recent Congressional enactment of the Fishery Conservation and Management Act of 1976. The findings and policies set forth in the Act itself establish the relationship between conservation of fisheries and limitations on foreign fishing effort. [Brief of Appellant, Note 3, p. 25 and Publ. L. No. 94-265, 90 Stat. 331, § 2(a)]. Virginia Code § 28.1-81.1 is based upon the same rationale underlying the recent federal enactment. The federal Act, however, is directed only at *foreign flag vessels,* and does not concern itself with *United States flag vessels* operated by foreign-controlled U.S. corporations.

The suggestion by Seacoast that the rationale for exclusion of foreign-flag fishing vessels from United States coastal fisheries under the federal Act does not support the exclusion, under the Virginia Statute, of foreign-controlled fishing interests operating U.S. flag vessels does not bear close scrutiny. Virginia was concerned that an increasing number of vessels owned by foreign controlled U.S. corporations would commence fishing in its waters, to the detriment of its fishing resources, as the national 200 mile limit legislation was enacted. This concern was shown to be well-founded in the Hearing on September 8, 1976 before the House Sub-committee on Fisheries and Wildlife Conservation and the Environment, which opened with a statement by the Chairman of the committee confirming the foregoing in the following terms:

> "It appears that, pursuant to the Foreign Investments Study Act of 1974, the Bureau of Economic Analysis of the Department of Commerce conducted a study to determine the extent of foreign investment in this [American fishing] industry. It has been determined that the major factor contributing to the surge of direct foreign investment in U.S. commercial fisheries during the year 1974 was a threat of extension of the U.S. exclusive fisheries zone from 12 to 200 miles."

Foreign fishing interests might avoid exclusion from the new 200 mile U.S. Fishery zone by operating U.S. flag vessels. And as we demonstrated (Brief of Appellant, pp. 27-28) foreign interests can, with relative ease, gain such access to American fisheries, including state fisheries, through use of U.S. corporate shells. The Virginia statute is directed at blocking such efforts by foreign interests. The Virginia statute, therefore, has as its purpose protection of a permissible state interest and is reasonable and directly related to achieving that purpose; it does not, therefore, offend equal protection principles of the Fourteenth Amendment. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

Seacoast attempts to discredit the justification for the statute in question by suggesting that the law was framed to apply specifically to them for the benefit of their competitors. They allege that the Appellant conceded (Appellee brief, p. 11) that the Virginia statute was limited in its effect to Seacoast; rather he stated in answer to Seacoast's counsel questioning in depositions (App. p. 60) that "to the best of my knowledge, that is the only firm that has been affected at this time." In fact, however, the statute applies

beyond the menhaden fishery in which Seacoast is involved to all types of commercial fishing. It was supported, not merely by Virginia menhaden operators, but by all segments of Virginia's seafood industry. The law is designed to meet a general problem, however personally Seacoast may apply it to themselves. In cases involving a state's regulation of its economic resources, the usual equal protection standard is applied. As this Court stated in *Dandridge* v. *Williams:*

> "If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. *But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants* of welfare payments to the largest AFDC families.[16] For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488." 397 U.S. 471, 484 (1970). (Emphasis added).

Seacoast alleges that Virginia Code Section 28.1-81.1 sweeps too broadly and is not precisely drawn. In fact, the statute does not attempt to prohibit foreign investment in the Virginia fishing industry as such. It merely limits the amount of control that foreign owners can have with respect

to the *harvest* of fisheries stocks in Virginia waters. The actual definitions of controlling interest in the Virginia statute are taken from the Federal Shipping Act and modeled after the same technique used by the national government in safeguarding the coasting trade. The danger seen by the Virginia General Assembly related to its fisheries stocks, and Virginia Code Section 28.1-81.1 is specifically limited to the *taking of fish*. It in no way restricts foreign investment in shore facilities nor does it attempt to limit the passage of U.S. flag vessels controlled by foreign nationals through Virginia waters.

Accordingly, Virginia Code § 28.1-81.1 is reasonably related to a legitimate state interest in conserving fisheries resources from depletion by foreign fishing interests and is, therefore, permissible as an exercise of the State's police powers consistent with the Fourteenth Amendment.

IV.

Virginia Code Sections 28.1-60 And 28.1-81.1 Do Not Violate The Commerce Clause Since They Neither Regulate Nor Unduly Burden Interstate Commerce.

Virginia Code §§ 28.1-60 and 28.1-81.1 establish licensing requirements for the taking of fish within Virginia's territorial waters, an activity this Court has consistently viewed as *local* in nature, apart from the flow of interstate commerce, and unquestionably within the permissible ambit of state police powers. *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), *Toomer* v. *Witsell,* 334 U.S. 385 (1948). The focus of the questioned Virginia statutes being *local,* Seacoast's reliance upon *Pennsylvania* v. *West Virginia,* 226 U.S. 553 (1923), *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911), and *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928) is quite obviously misplaced. In each of the just-mentioned cases the state legislation found viola-

tive of the Commerce Clause directly prohibited interstate shipment or transportation of commercial commodities beyond the borders of the regulating state. Virginia Code §§ 28.1-60 and 28.1-81.1 relate only to the eligibility to take fish in Virginia waters and in no way, directly or indirectly, affect the free flow of fish, taken in Virginia, out of the state in interstate commerce. The laws in question here do not prohibit out of state transportation of fish (*Oklahoma* v. *Kansas Natural Gas Co., Penna.* v. *West Virginia*) nor do they require that fish taken in Virginia be processed in Virginia (*Foster-Fountain Packing Co.* v. *Haydel*).

Similarly, Seacoast's reliance upon *H. P. Hood & Sons* v. *DuMond,* 336 U.S. 525 (1949) and *Baldwin* v. *Seelig,* 294 U.S. 511 (1935) is unwarranted. In both *Hood* v. *DuMond* and *Baldwin* v. *Seelig* the statute found invalid, while purporting to regulate only locally, had the necessary practical effect of impeding the otherwise established free flow of commerce. By contrast, the Virginia statutes under consideration here regulate the taking of fish, before they become articles of commerce, and in so doing do not obstruct any substantial or established interstate flow of fish or fish products into or out of Virginia.

Nippert v. *Richmond,* 327 U.S. 416 (1945) is relied upon by Seacoast as controlling, but that case provides no authority for invalidating the Virginia laws considered here. *Nippert* involved a local tax on solicitation of orders for goods to be shipped into Virginia in interstate commerce. The solicitation tax was viewed by this Court as an impediment to solicitation of orders by out-of-state vendors, thereby burdening, in fact, a substantial interstate flow of out-of-state goods into Virginia. In determining whether a law unduly burdens interstate commerce, however, this Court has always looked to the actual practice and established course of business in the particular industry involved. As

was noted in *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928):

> "In determining what is interstate commerce, courts look to practical considerations and the established course of business." 278 U.S. 10

Prior to enactment of Virginia Code § 28.1-81.1 Seacoast was eligible for licenses to take menhaden in Virginia's three-mile coastal waters. Yet Seacoast, in fact, engaged in little or no menhaden fishing in Virginia. (App. pp. 36-37). Thus, even if the movement of fishing vessels from one state to another for purposes of taking fish is viewed as commerce, though we firmly contend it is not, Virginia's laws which prevent Seacoast from taking her fish impose no restriction upon any established course of interstate trade or business. In *Nippert,* on the other hand, the practical effect of the tax upon interstate commerce was substantial, in view of the well established interstate business of itinerate salesmen and the interstate shipment of goods resulting from their solicitation.

We do not contend, as Seacoast implies, that the local nature of the activity regulated by the Virginia laws in question forecloses any inquiry into the validity of the laws under the Commerce Clause. But before laws regulating local activities can be found to violate the Commerce Clause it must be shown that such laws, *in fact, unduly burden interstate commerce. Nippert* v. *Richmond,* 327 U.S. 416 (1945). The Virginia laws under consideration do not, in fact, unduly burden any established interstate commerce. Even where state laws which regulate local matters do, in fact, affect interstate commerce, the fact that the law impacts commerce does not automatically invalidate it. *Parker* v. *Brown,* 317 U.S. 341 (1943). This Court held *Parker* v. *Brown:*

". . . When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. [citations omitted]

* * *

"Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *DiSanto* v. *Pennsylvania,* supra. cf *Wickard* v. *Filburn,* supra, not because they control interstate activities in such a manner as only to affect commerce rather than to command its operations. *But they are to be upheld because upon consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be a wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce* . . . ." (Emphasis added)

This view has been consistently applied in upholding state laws which regulate matters of vital local concern while impacting interstate commerce to a degree viewed as permissible under the Commerce Clause, in the absence of Congressional regulation, and taking into consideration the uniquely local nature of the problems addressed by the state legislation. *Minnesota Rate Cases,* 230 U.S. 352 (1913), *South Carolina Highway Dept.* v. *Barnwell Bros.,*

303 U.S. 177 (1938), *California* v. *Thompson,* 313 U.S. 109 (1941).

Seacoast has not specified, in fact, any impact upon interstate commerce resulting from the Virginia statutes. Where a state law regulates a local activity and does not affect interstate commerce it must be upheld against Commerce Clause objections. *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422 (1936). This, we submit, is the case here. There being no impact upon commerce as a result of Virginia's statutes, they must be upheld against Seacoast's Commerce Clause objections. And in any event, the uniqueness of the problems associated with management of local fisheries, each with its peculiar characteristics, demands wide latitude for state fisheries regulation where Congress has not acted and the impact upon commerce, if any, is insubstantial. *Minnesota Rate Cases,* 230 U.S. 352 (1913); *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938), *California* v. *Thompson,* 313 U.S. 109 (1941).

CONCLUSION

Historically, the states have, by their laws, regulated the fisheries within state territorial boundaries. Such fisheries regulation has always included state licensing statutes similar to Virginia Code §§ 28.1-60 and 28.1-81.1.

Federal enactments governing the enrollment and licensing of fishing vessels as United States vessels (46 U.S.C. §§ 251, 263) do not confer upon the owners of United States vessels the right to take fish from the waters of every state, thereby preempting the state license requirements. Accordingly, Virginia Code §§ 28.1-60 and 28.1-81.1 are not preempted by the federal vessel enrollment and licensing statutes.

Federal statutes which regulate the nationality of the owners of United States vessels (46 U.S.C. §§ 11, 252) do not confer the right to take fish in state territorial waters and, therefore, are not in conflict with and do not preempt Virginia Code § 28.1-81.1. The provisions of the Shipping Act governing transfer of United States vessels to foreign interest (46 U.S.C. §§ 808, 835) in no way conflict with or preempt Virginia Code § 28.1-81.1 licensing the taking of fish in Virginia territorial waters.

The Bartlett Act (16 U.S.C. § 1081) and the Fisheries Conservation and Management Act of 1976 (16 U.S.C. § 1801 et seq.) deal with fishing by foreign flag vessels, not United States vessels, and, therefore, cannot preempt Virginia Code § 28.1-81.1 in its application to the United States vessels of the Appellees in this case.

Nor does § 28.1-81.1, in any manner, intrude upon federal authority in foreign affairs.

Virginia Code § 28.1-60 limiting licensing for taking of Chesapeake Bay menhaden to Virginia resident corporations is reasonably related to the legitimate state purpose of conserving valuable fisheries and, is, therefore, permissible under traditional Fourteenth Amendment Equal Protection standards.

Virginia Code § 28.1-81.1 which excludes foreign-controlled corporations from eligibility for commercial fishing licenses is reasonably related to the legitimate state purpose of conserving valuable fisheries and, is, therefore, permissible under traditional Fourteenth Amendment Equal Protection standards.

Virginia Code §§ 28.1-60 and 28.1-81.1, regulating the local activity of taking fish in state territorial waters, do not regulate or unduly burden interstate commerce in contravention of Article I, § 8 of the Constitution.

The holding of the District Court, insofar as it holds Virginia Code § 28.1-81.1 is preempted by federal law and that Virginia Code §§ 28.1-60 and 28.1-81.1 are violative of the Fourteenth Amendment, should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Moore, Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for James E. Douglas, Jr., in the above-captioned matter, hereby certify that three (3) copies of this Reply Brief have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this ..... day of January, 1977, as follows:

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No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees

On Appeal from the United States District Court for the Eastern District of Virginia

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In The

Supreme Court of the United States

October Term 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

---

BRIEF AMICI CURIAE ON THE MERITS

INTERESTS OF AMICI CURIAE

The interests of the *amici curiae* are set out in the motion for leave to file and brief in support of the statement as to jurisdiction. On that motion, *amici curiae* moved "that their petition to file a brief *amici curiae* in support of Appellant's Jurisdictional Statement, as well as his brief on the merits, be granted." (p. vi) On 26 April 1976, this Court granted the motion: "The motion for leave to file a brief *amici curiae* is granted." If that leave was solely for the brief in support of the jurisdictional statement, we respectfully renew our motion, for the reasons heretofore asserted, for leave to file this brief on the merits.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on 7 November 1975. It is

not yet reported. Copies of the opinion and final order are set forth in the Appendix A to our brief in support of the jurisdictional statement.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered on 7 November 1975 by a three-judge district court convened under 28 U.S.C. § 2284. The jurisdiction of this Court rests on 28 U.S.C. § 1253. This Court noted probable jurisdiction of this appeal on 26 April 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Interstate Commerce Clause, Article I, § 8, cl. 3; the Supremacy Clause, Article VI, ¶ 2; and the Equal Protection Clause, Amendment XIV, § 2.

The statutory provisions are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1.

These are set out in full in Appendix A.

QUESTIONS PRESENTED

1. Do state laws that prohibit a foreign-owned corporation from invading fisheries in state territorial waters, and a non-resident corporation from taking a specific class of fish from an inland sea, violate the Commerce Clause or the Equal Protection Clause of the Fourteenth Amendment?

2. Does the Bartlett Act, 16 U.S.C. §§ 1081 et seq., preempt state authority over its territorial waters, although the state authority has existed since 1781 and the terms of the Act, its purpose, its legislative history, and other federal legislation all speak against such preemption?

STATEMENT

This case is concerned with the right of the Commonwealth of Virginia to protect its fisheries against depredations by the Appellees, corporate subsidiaries of an English corporation.

The fisheries in question are the Chesapeake Bay, an historic inland sea recognized as such by the United States government,[1] and the marginal sea extending from the Virginia Coast into the Atlantic Ocean to the extent of three miles. The statutes involved in this appeal make no attempt to regulate or control the issuance of licenses for the taking of fish in the United States Fisheries Conservation Zone, which commences at the three mile limit and extends seaward, and which is recognized by all parties to be under exclusive federal jurisdiction.

Section 28.1-81.1 of the Virginia Code regulates the issuance of licenses for the taking of all fin fish within either the Chesapeake Bay or the marginal sea, requiring that all licensees be United States citizens. The Appellees cannot qualify for a license under this law because they are not United States citizens but foreign-owned corporations. As non-residents, Appellees cannot qualify under § 28.1-60 of the Virginia Code which regulates issuance of licenses for a specific Virginia fishery, menhaden fishing in the Chesapeake Bay.

Appellees have not heretofore fished in the Chesapeake Bay nor have they engaged in any significant fishing in Virginia marginal sea for at least the last fifteen years.[2] They have not been in competition with domestic fishermen for the taking of menhaden in Virginia territorial waters.

Menhaden is one of the most valuable fishery resources

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[1] The Convention of the Territorial Sea and The Contiguous Zone was adopted for purposes of the Submerged Lands Act in *United States* v. *California*, 381 U.S. 139, 161-167 (1965) and *United States* v. *Alaska*, 422 U.S. 184 (1975).

[2] See Stipulations Stated By Counsel in Open Court at 2-3.

located in Virginia territorial waters. Although menhaden are found in some measure from Maine to Florida, the Chesapeake Bay acts as a nursery for the development of the fish. While final data is not yet complete, studies over the last several years indicate that fish spawn off the Virginia and North Carolina capes and large numbers enter the sheltered waters of the Chesapeake Bay and its tributaries as fingerlings. In the estuarine waters of the major tributary rivers (which by statute in Virginia are protected against menhaden fishing by anyone) the small menhaden develop in great quantities. As they mature into fish of from one to two years of age they school in the Bay between May and December of each year and form the basis for the resource fished by the Virginia industry. In the winter and spring many of the larger fish leave to spawn at sea and thence to range along the Atlantic Coast. Alone among the Atlantic states, Virginia imposes seasonal limits on the fishing for menhaden, limitations on net mesh size and protects selected waters for small fish development.

While menhaden, as most fin fish, are quite mobile and as older fish range for considerable distances, the distinguishing feature of menhaden in Virginia waters during their first two years of life is their relative stability. They form a particularly stable population as one and two year old fish in the Chesapeake Bay during the Virginia menhaden fishing season extending from May to December. It is against this relatively stable fishing stock that the Virginia menhaden fishing effort is directed.

The season is changed periodically and the fishing effort imposed upon this resource is adjusted from time to time, based upon the recommendations of scientists at the Virginia Institute of Marine Science and the National Marine Fisheries Service and the Virgina producers. The resource is recognized by the participants as being of immense value, but requiring great care in terms of its preservation.

Since the earliest days of the Republic, both the states and the national government have exercised concurrent control over the commercial fisheries of the United States, particularly those in the marginal sea. The United States has controlled the documentation of fishing vessels, providing for their register or enrollment. The states on the other hand have licensed the taking of fish within territorial waters of the state, and have provided all management regulations relating to the fisheries. Thus, in order to fish within the marginal sea it has always been necessary for a vessel to be documented by the United States and to have a license to fish from the state from whose waters the fish are to be taken. Appellees have questioned the long established authority of the states to issue licenses for the taking of fish from the states' territorial waters.

The Appellees here, plaintiff below, English-owned fishing corporations, brought suit to enjoin the enforcement of two provisions of the Virginia Code governing the taking of fish off the Virginia shores and in the Virginia bays. The first of these is § 28.1-60 of the Code of Virginia of 1950, as amended; the second is § 28.1-81.1 of the same Code.

It was on 23 March 1871 that the General Assembly of the Commonwealth adopted the predecessor of § 28.1-60. While the provision has been amended from time to time with regard to matters not relevant here, it has remained substantially the same for the last thirty-eight years.

In essence, § 28.1-60 prohibits Appellees from taking fish for the purpose of converting the same into oil, fish meal, etc., except as provided in § 28.1-60(e). The effect of the statute is to prohibit Appellees from taking menhaden within Virginia's chief inland sea, the Chesapeake Bay.

The second statute under attack is § 28.1-81.1 of the Code of Virginia of 1950, as amended, which was signed by the Governor of Virginia and became effective on 19 March 1975. The effect of this statute is to reserve the harvesting

of fish in Virginia waters to citizens of the United States. It is intended to deal with the problem of the threatened destruction of Virginia's fisheries by foreign fishing practices. Foreign-owned corporations, unlike domestic fishermen, have no interest in preserving rather than exhausting local fisheries. As a result of overfishing by foreign interests, Virginia has experienced the virtual elimination of certain formerly important fisheries, such as the river herring.

Realizing that the 200 mile fisheries limit legislation before Congress would soon become a reality, and further realizing that such action would create new impetus for foreign fishing fleets to seek all available legal means to operate in coastal waters of the states, various fisheries interests, including several of the companies acting as *amici curiae* herein, testified as to the effect of foreign fishing practices on fishing stocks in support of legislation before the General Assembly to close the "loophole" which would permit foreign-owned fishing vessels to fish (through shell corporations) in Virginia waters. The statements of Ammon G. Dunton, Jr. and Allen W. Haynie, in support of this legislation before the Committee on Agriculture, Conservation and Natural Resources, in the Virginia State Senate, and the Committee on the Chesapeake and Its Tributaries, in the House of Delegates respectively are annexed hereto as Appendices B and C to indicate the purpose of this legislation. The bill was also recommended by the unanimous vote of the Virginia Marine Resources Commission at a duly convened meeting on 28 January 1975. The bill was voted out of the Senate committee without a dissenting vote. Upon the floor of the Senate, consisting of 40 members, the bill was adopted by the vote of 40 to 0. In the House of Delegates, the bill was referred to the Committee on the Chesapeake and Its Tributaries, which approved the bill by unanimous vote. On the floor of the House the bill was approved as emergency legislation by the vote of 85 to 0.

Appellees are English-owned corporations organized and with their principal places of business outside of the Commonwealth of Virginia. Seacoast Products, Inc., the parent corporation among the Appellees, although organized under the laws of New York, is wholly owned by Hanson Trust Ltd., an English corporation.

On 22 May 1975, one of the Appellees, The New Smith Meal Company, Inc., made application for a Virginia license to fish for menhaden in Virginia territorial waters. That license was denied because § 28.1-81.1 of the Virginia Code forbids the issuance of such licenses to non-citizens of the United States.

This action was instituted on 14 July 1975. It sought to enjoin Appellant from enforcing §§ 28.1-60(3) and 28.1-81.1 upon the grounds that said provisions violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and upon the ground that the statutes place an undue burden on interstate commerce. On 18 July 1975, a special three-judge court was designated to consider the issues. On 7 November 1975, a judgment and opinion were rendered sustaining a motion by Appellees for summary judgment.

The three-judge court held that the Virginia laws in question violated the Appellees' Equal Protection rights by distinguishing between citizens and non-citizens and between residents and non-residents for purposes of issuing licenses for fishing in Virginia territorial waters and in the Chesapeake Bay. It did not resort to the Commerce Clause argument put forward by Appellees. Nor did it consider the due process issue, which has not been further argued by Appellees. But it did, on its own accord, conclude that the subject was preempted by federal law, the Bartlett Act, 78 Stat. 194, 16 U.S.C. §§ 1081 *et seq.*

It is from this judgment that this appeal has been taken.

ARGUMENT

It is important to recognize at the outset that Appellees are constitutionally neither "citizens" nor "aliens," but, at best, only "persons."[3]

The importance of the fact that they are not citizens is established by *Asbury Hospital* v. *Cass County,* 326 U.S. 207, 211 (1945). The Court there held that a foreign corporation: "is neither a citizens of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment." The Court continued: "The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it."

The importance of the fact that Appellees are not aliens lies in their consequent inability to call on the Naturalization Clause, Art. I, § 8, cl. 4, and the inferences drawn therefrom that aliens are subject to control by the national and not the state government, at least in some instances. *Compare Graham* v. *Richardson,* 403 U.S. 365 (1971) *with Mathews* v. *Diaz,* 44 L.W. 4748 (1 June 1976); *and Sugarman* v. *Dougall,* 413 U.S. 634 (1973) *with Hampton* v. *Mow Sun Wong,* 44 L.W. 4737 (1 June 1976).

I.

The Virginia Statutes In Dispute Do Not Unduly Burden Interstate Commerce.

It should be noted that the statutes in question are concerned solely with the "taking" or "catching" of fish. They are not concerned with the movement of fish already caught or with the processing of fish or fish products.

---

[3] While corporations have been held to be "persons" within the meaning of the Fourteenth Amendment, on what are obviously dubious grounds, see Mr. Justice Black, dissenting in *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U.S. 77, 85-90 (1938), we have discovered no case to afford either a holding or rationale for extending this category to foreign-owned corporations.

A. Taking Fish In State Waters Is A Matter Of Local Concern, Not Controlled By The Commerce Clause Of The United States Constitution.

Taking fish in state territorial waters is a matter of local concern, occurring before such fish enter interstate commerce. Chief among the precedents so holding is the case of *Toomer* v. *Witsell,* 334 U.S. 385 (1948). In *Toomer,* this Court held that the Commerce Clause was not violated by a state law regulating the taking of shrimp in coastal waters.

> Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce in shrimp, and the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce. [*Id.* at 394-395.]

More recently *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), reiterated the *Toomer* position. *Arctic Maid* concerned Alaska's power to tax the operations of a freezer ship in state territorial waters. Rejecting the suggestion that the Alaska statute unduly burdened interstate commerce, this Court stated:

> The process of gathering fish either through catcher boats that are part of respondent's fleet or through independent operators is a "local activity" . . . in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer* v. *Witsell, supra*) and extraction of ore . . . are not dispositive of this controversy . . . . In both [cases] the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the state can constitutionally reach. [*Id.* 203-204.]

To counter the law established by this Court, Appellees would place primary reliance upon *Foster-Fountain Packing Co., Inc.* v. *Haydel,* 278 U.S. 1 (1928), decided prior to *Toomer* and *Arctic Maid. Foster-Fountain Packing Co., Inc.*

was directly concerned with a Louisiana statute that prohibited the shipment out of the state of any shrimp from which the heads and hulls had not been removed, thus attempting to insure that all processing was done in Louisiana. The Virginia statutes challenged here do not attempt to impede the movement of fish in interstate commerce after they have been taken. See *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422, 426-427 (1936).

Not only do the precedents discussed above indicate that fishing activities are purely local matters, but policy and logic also lead to that conclusion. In matters of peculiarly local impact, such as fishing, the state is in the best possible position to recognize and correct the myriad problems with which it alone is faced. The nature of those problems vary from state to state and the appropriate remedies cannot be fitted to a Procrustean bed. The lobster industry in Maine differs widely from the sponge fishing industry in Florida, both of which are different from the menhaden activities in Virginia. Local fishing activities are decidedly not susceptible to a single national regulatory program.

The states have traditionally been regarded as having retained the power to regulate and control fishing in their territorial waters. To deprive the states of this authority under the guise of the Commerce Clause, would be to disregard the fundamental distinctions enunciated as long ago as *Geer* v. *Connecticut,* 161 U.S. 519 (1896), as to the very structure of government provided by the Constitution.

B. Even If Taking Fish Were A Part Of Interstate Commerce, The Virginia Statutes In Dispute Do Not Impose An Undue Burden.

That a particular commercial activity is an aspect of interstate commerce does not, in the absence of federal preemption, remove it from the control of state law. This principle has been clearly enunciated in the landmark cases on the subject. Thus, in *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945), this Court said:

> [I]t has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. . . . Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. . . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. . . .

This opinion, together with *Freeman* v. *Hewit,* 329 U.S. 249 (1946); *Parker* v. *Brown,* 317 U.S. 341 (1943); *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938); and the cases cited in the previous section, make clear that state interests are entitled to protection even where they may affect interstate commerce, so long as the state's interest is legitimate and the national government has not chosen to impose a rule of its own.

The challenged statutes are designed for effective enforcement of a well-reasoned conservation program which includes necessary limitations on net size, fishing season, and fishing areas. Just as the prevention of air pollution is a matter of local health within state police power, *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 448 (1960), the treatment of problems which beset local fisheries is also a matter of local concern within state police power. Such local resource management programs clearly do not disrupt a uniformity of regulation which has not existed, does not now exist, and could not reasonably exist in the future due to the widely varying nature of the fishing industry from state to state.

Appellees would rely on their assertion of an improper legislative motive as the reason for rejecting local legislation directed at a local problem. Suffice it to respond that

this court has consistently held that state statutes are entitled to a presumption of constitutionality. See generally *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144 (1944); *Alaska Packers Ass'n.* v. *Industrial Accident Commission of California,* 294 U.S. 532 (1935); *Borden's Farm Products* v. *Baldwin,* 293 U.S. 194 (1934).

II.

The Virginia Statutes Have Not Been Preempted By Federal Law.

In its final order, the court below held as follows:

> In our judgment this legislation (Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081, *et seq.*) preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them.
>
> The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester, supra*—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit.

In short, the trial court held that the respective states have no power in the marginal sea.

Respectfully, we submit that the cited cases do not support such a conclusion. Witness the following language of this Court in *Toomer:*

> [The appellants] urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark. In the court below *United States* v. *California,* 332 U.S. 19 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claims, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes* v. *Florida,* 313 U.S. 69, 75 (1941), that "It is also clear that Florida has an interest in the proper

> maintenance of the sponge fishery and that the [state] statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State."*
>
> Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery. [334 U.S. at 393.]

The proper question is not whether the national government's paramount interests preclude state regulation—they clearly do not—but whether there is evidence of national legislation that preempts Virginia's particular regulatory action here. There is no such legislation.

A. The Power Of The Individual States To Regulate Fisheries In State Inland Waters And In The Marginal Sea Has Not Been Preempted By The Bartlett Act, 16 U.S.C. §§ 1081, et seq.

Heretofore it has been recognized that the power to regulate fisheries within the boundaries of the respective states was reserved to the states. *Toomer* and *Skiriotes, supra,* are ample evidence of this proposition. But the principle carries older credentials than these. For example, in a context clearly pertinent to that of this case, in *Manchester* v. *Massachusetts,* 139 U.S. 240, 258 (1891), this Court ruled:

> [T]he right to the fisheries and the power to regulate the fisheries on the coasts and in the tide-waters of the State were left, by the Constitution of the United States, with the States, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic.

See also *Bayside Fish Flour Co.* v. *Gentry, supra,* where this Court, in holding that the statute in issue did not violate the Commerce Clause, or the Due Process or Equal Pro-

tection Clauses of the Fourteenth Amendment, confirmed the regulatory power of the state.

This proposition has since been reinforced by Congressional Legislation; the Submerged Lands Act, 43 U.S.C. § 1311(a), reads as follows:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable state law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective states.* . . . [Emphasis added.]

Section 1301 defines "natural resources" to include "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life," and defines "lands beneath navigable waters within the boundaries of the respective states" as that area "seaward to a line three geographical miles distant from the coast line of each such state."

It is against the background of the case law confirming the continued vitality of states' rights to regulate commercial fishing within inland waters and the marginal sea, and congressional legislation to the same effect, that the trial court held that such rights had been preempted by the Bartlett Act, 16 U.S.C. § 1081 *et seq.*

This Court, on the other hand, ever mindful of the need to avoid the fostering of unnecessary and unintended friction between the federal and state governments, has been most cautious in invoking the doctrine of preemption where the national legislation does not clearly command it. This caution is exemplified by *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. at 443, discussed at length *infra,* where it was stated that:

> "In other words, such intent [to preempt state regulation] is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. . . ."

See also *Rice* v. *Santa Fe Elevator Corporation,* 331 U.S. 218 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405 (1973).

It is apparent on the face of the Bartlett Act that it does not conflict with or otherwise preempt the state power over its fisheries that Virginia has exercised here. The federal law simply provides that it is not legal for a foreign flag vessel to fish in American waters, except pursuant to a treaty. It authorizes certain exceptions to be made, with the "concurrence of any State, Commonwealth, territory, or possession directly affected." The entire section is set out in Appendix A at 1-2.

Obviously, the general regulation of the fisheries in the three-mile zone was left to state control by the law, although it permitted the states to acquiesce in a license to foreign vessels on notice to Congress and at the request of the Secretaries of the Treasury, State, and Commerce Departments. It would take a strained reading of the language of the statute to find preemption here.

If there is any doubt from reading the language of the statute that Congress did not intend to preempt state authority in the three-mile zone by passage of the Bartlett Act, the authoritative statements in the reports of the respective Senate and House Committees should lay those doubts to rest. The Report of the House Merchant Marine and Fisheries Committee, H.R. Rep. No. 1356, 88th Cong., 2d Sess., reads:

> It was brought out at the hearings that the powers of the States in dealing with trespassers of their territorial waters would not be preempted by the passage of this bill and for those States already having sanctions, this bill would only supplement existing case law. [2 U.S. Code Cong. & Adm. News 1964 at 2183.]

So, too, was the view of the Senate Commerce Committee in Sen. Rep. No. 500, accompanying S-1988, 88th Cong., 1st Sess. (1963), at 4:

> This bill will not preempt the states of their powers against trespassers of their territorial seas. Some states now have sanctions, although they often are not as comprehensive as those which this bill would enact. The laws of the states would be effectively supplemented by the proposed bill.

The purpose and effect of the Bartlett Act was to provide policemen to enforce whatever restrictions the states had validly promulgated with regard to their fisheries. Far from preempting or demeaning state control, the statute provided means for effectuating state control.[4]

To read the Bartlett Act as preempting state authority in the three-mile zone would not only be inconsistent with the language of the statute and with its legislative history, it would require an inference that the Bartlett Act has repealed or amended, *sub silentio,* a large body of federal laws that both recognize and protect the state interests in the three-mile zone, including the Submerged Lands Act, *supra,* and others discussed below.

The Contiguous Fisheries Zone Act, 16 U.S.C. §§ 1091 *et seq.,* enacted on October 14, 1966, established an exclusive 9-mile fisheries zone contiguous to the states' 3-mile territorial seas. The final section of that Act, 16 U.S.C. § 1094, reads as follows:

> Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or *as diminishing their jurisdiction to such resources beneath and in the waters of*

[4] The testimony at the hearings buttresses this conclusion. Hearings before the House Committee on Merchant Marine and Fisheries, on S. 1998, 88th Cong., 2d Sess. 64, 81, 93 130, 139 (1963); Hearings before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce of the U.S. Senate, on S. 1988, 88th Cong., 1st Sess. 27, 35 (1962).

> *the territorial seas of the United States.* (Emphasis added.)

Similar recognition of the rights of the individual states within their 3-mile territorial seas, is to be found in the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.,* enacted October 27, 1972, particularly in § 1451(h) of that Act, which encourages "the states to exercise their full authority over the lands and waters in the coastal zone."

The most recent development in the legislative area is the Fishery Conservation and Management Act of 1976. Pub. L. No. 94-265, 90 Stat. 331, approved April 13, 1976. By the terms of that Act, both the Bartlett Act, *supra,* and the Contiguous Fisheries Zone Act, *supra,* are repealed as of March 1, 1977. For purposes of the case at hand, two sections of the Fishery Conservation and Management Act of 1976 are particularly pertinent. Section 101 sets out the geographical extent of United States jurisdiction as being a zone one hundred and ninety-seven miles out from the three-mile marginal sea, over which the respective states retain jurisdiction. Section 306(a) of the same act reiterates the nature and extent of state jurisdiction:

> Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

The reason for legislative deference shown to state sovereignty by these two sections is provided by the Report of the Senate Committee on Commerce, S. Rep. No. 416, accompanying S. 961, 94th Cong., 1st Sess. (1975), at 22:

> The boundaries of the [Fishery Conservation] zone are drawn so as to place the zone outside of the seaward boundaries of the individual coastal States, but not more than 200 nautical miles from the U.S. coastline. The seaward boundaries of the coastal States are defined in Section 2 of the Submerged Lands Act (43 U.S.C. 1301). In all cases, except with respect to Texas and Florida in the Gulf of Mexico where their seaward

boundaries are 9 miles from shore, State boundaries are located 3 miles from the coast. Although this creates an anomaly with respect to Texas and Florida, *it preserves the domestic breakdown of management authority between the States and the Federal Government which has prevailed since the founding of the republic.* (Emphasis added.)

In *Manchester* v. *Massachusetts,* 139 U.S. at 266, the final paragraph reads:

> We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the Statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State.

If the absence of Congressional action in this area persuaded the Court in 1891 that states retained the right to control fisheries, then the affirmation of this right contained in the recent Congressional legislation should persuade the Court in 1976 that the individual states have still not been preempted by Congress from regulating fisheries within the marginal sea.

B. The Power Of The Commonwealth Of Virginia To Regulate Fishing Within Its Boundaries Through Virginia Code Sections 28.1-60 And 28.1-81.1 Has Not Been Preempted By The Shipping Acts Or By Any Other Controlling Federal Law.

An even more tenuous claim to preemption than that offerred by the trial court has been put forth by Appellees. They, in their Motion to Affirm, have taken the position that the issuance of Certificates of Enrollment and License for vessels owned by Seacoast and its subsidiaries in the American fisheries, after affirmative action of the Maritime

Administration approving the transfer of such vessels to Seacoast and its subsidiaries, constituted a license to fish in Virginia waters, overriding Virginia law. The Appellees' brief in support of this proposition betrays a confusion as to the nature of the Maritime Administration proceedings as well as the roles of the federal government, which documents American vessels, and of the respective states, which issue licenses for the taking of fish within their jurisdictions.

The Maritime Administration proceedings were conducted under §§ 9 and 37 of the Shipping Act of 1916 (46 U.S.C. §§ 808 and 835). Following a hearing in which it was admitted that Seacoast and its subsidiaries were aliens within the definitions of the Shipping Act, the Maritime Administration permitted certain vessels to be transferred to Seacoast and its subsidiaries. Seacoast had indicated in its application that it intended to use the vessels in the American fisheries. Subsequently, in separate proceedings, the ship-owning companies applied to the Coast Guard for issuance of the usual Consolidated Enrollments and Licenses, which would constitute vessel documentation for each of the vessels.

The product of the Maritime Administration proceeding was a "transfer order" for each vessel, permitting the vessel to be "sold alien." (See Appendix D for a typical order issued in this case.) The product of the Coast Guard proceedings for vessel documentation, which are handled administratively without hearings, was the Consolidated Certificate of Enrollment and License, the typical vessel document for United States flag coastal fishing vessels.

The transfer orders which the Maritime Administration issued under 46 U.S.C. §§ 808, 835 did nothing more than to authorize the ownership of certain United States vessels by certain subsidiaries of a corporation which, by its own admission, is foreign owned. Neither of those sections can be read as admitting the Appellee's fleet into the fisheries of Virginia. Such was not the intention of either statute.

The Appellees rely heavily on portions of the documentation laws (46 U.S.C. §§ 251(a) and 263) to support their position that the federal government has preempted state authority to control admission to local fisheries. The particular part of Section 251 which is claimed to be applicable to the case at hand reads:

> (a) Vessels of twenty tons and upward enrolled in pursuance of sections 251-255, 258, 259, 262-280, 293, 306-316, 318, 321-330 and 333-335 of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled have a license in force, as required by such sections, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries.

Section 263 merely set out the form of license. The Appellees urge that the foregoing statutes be interpreted to mean that documentation, *i.e.*, enrollment and licensing, constitutes an affirmative grant of the right to participate in any state's local fisheries. However, the most which section 251(a) can be said to do is to limit the coasting trade and American fisheries to United States documented vessels. A United States documented vessel, engaged in the domestic trades, must have an enrollment and a license. The forms of enrollment and license are set forth in 46 U.S.C. §§ 259 and 263, respectively. Pursuant to 46 U.S.C. § 260, the vessel in question receives a single or consolidated vessel document, being an enrollment (permanent except in unusual circumstances) and a license (requiring annual certifications and renewals), which identifies the current use of the vessel. Because of differing inspection laws as to vessels in different trades, etc., the Coast Guard is required to know the current use of the particular American flag vessel.

The form of the license, specified in Section 263, is intended to identify the use intended by the owner and permitted by the laws of the United States. In the fishing context, this "license" has never been held to be preemptive of

the ability of states to license in their own territorial waters. In *Manchester* v. *Massachusetts* and those cases discussed in part I, *supra*, it can be seen that the grant of a federal license has not been held to override the independent power of the states to control local fishing activities.

Under the terms of such fishing vessel documentation, the vessel is privileged to do the following: (1) To navigate freely in the waters of all states; (2) To have the benefits of an American flag vessel while fishing in international waters including the benefit of fishery treaties to which the United States is a party; (3) To fish within the exclusively federally controlled fisheries conservation zone (3-12 miles from the U.S. coast until March 1, 1977 and then 3-200 miles pursuant to the Fisheries Conservation and Management Act of 1976); and (4) To fish in the territorial waters of the states, *provided* that state licenses are obtained and local fishing laws are complied with.

Accordingly, a federal vessel document does not amount to an affirmative grant of a right to take fish from Virginia waters in violation of its laws. This has been clear at least since 1855, when this Court allowed the forfeiture of a federally enrolled ship because it had engaged in dredging for oysters in violation of Maryland law. See *Smith* v. *Maryland*, 18 How. 71 (1855).

This Court in *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. at 447 rejected an argument similar to the one advanced here.

> An additional argument is advanced, however, based not upon the mere existence of the federal inspection standards, but upon the fact that appellant's vessels were actually licensed, 46 U.S.C. § 263, and enrolled, 46 U.S.C. §§ 259-60, by the national government. It is asserted that the vessels have thus been given a dominant federal right to the use of the navigable waters of the United States, free from the local impediment that would be imposed by the Detroit ordinance.

The opinion conceded that the license and enrollment entitled the vessel to enter the state waters without undue burdens being placed on it for sailing in those waters. But the license did not exonerate the vessel from the police power of the state.

> The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federal licensed vessel is not, as such, exempt from local pilotage laws, *Cooley* v. *Board of Wardens*, 12 How. 299; or local quarantine laws. *Morgan's L. & T.R. & S.S. Co.* v. *Louisiana Board of Health*, 118 U.S. 455, or local safety inspections, *Kelly* v. *Washington*, 302 U.S. 1, or the local regulation of wharves and docks, *Cincinnati, P.B.S. & P. Packet Co.* v. *Catlettsburg*, 105 U.S. 559. Indeed, this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forefeiture of a vessel "licensed for the coasting trade, under the laws of the United States, while engaged in that trade." *Smith* v. *Maryland*, 18 How. 74. [363 U.S. at 447.]

This Court has not retreated from its deference to local police power asserted against nationally licensed vessels. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973). There is no reason to do so here where the state authority to act has such venerable and long-established legitimation, and where the Congress has repeatedly refused to invade the province of the states.

III.

Neither Virginia Code § 28.1-60 Restricting Menhaden Fishing In The Chesapeake Bay To Virginia Residents Nor Virginia Code § 28.1-81.1 Limiting Licenses For Commercial Fishing To Citizens Of The United States Violate The Equal Protection Clause Of The Fourteenth Amendment.

A. Virginia's Exclusion Of Non-residents From The Menhaden Fishery Within Its Inland Waters Is A Valid Exercise Of Its Police Power To Regulate And Conserve Its Fisheries Resources And Is Permissible State Regulation Under The Fourteenth Amendment.

Virginia Code § 28.1-60 prohibits non-residents from taking fish in the waters of the Commonwealth for converting the same into oil, fishmeal, fishscrap, etc., with an exception that allows them to fish for menhaden within the territorial sea; the law effectively prohibits non-residents from taking menhaden within the waters of the Chesapeake Bay. By this statute, Virginia seeks to regulate the chief commercial fishery operating within its inland waters.

The lower court found this provision in violation of Appellees' rights under the Equal Protection Clause relying on *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948). The lower court's reliance on *Takahashi* is clearly misplaced. That case did not involve a classification between residents and non-residents. California there had singled out a group of legal residents definable by race and national origin, although there was no rational basis offered for the classification except a prejudice against Japanese not eligible for citizenship.

As this Court made clear in *Dandridge* v. *Williams*, 397 U.S. 471, 485, n. 17 (1970), racial discrimination will render a classification inherently suspect. Unlike *Takahashi*, which did involve racial discrimination, the challenged Virginia statutes are free from that taint. Neither do they affect sensitive First Amendment rights, which the Court in *Dandridge* separately treated. 397 U.S. at 484. Instead, the traditional rules governing equal protection standards govern this case; they are expressed by the Court in *Dandridge* in the following terms:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable ba-

sis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago*, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426. [397 U.S. at 485.]

See also *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Village of Belle Terre* v. *Boraas, supra.*

Classification in terms of residency are to be judged by the same standard. Although the Court has struck down "durational residency" requirements, where it found no compelling state interest for imposing them in the face of a claim of a fundamental right, it has also sustained residency requirements—even "durational residency" requirements, where there is a substantial state interest to be protected by that classification. Thus, the Court pointed out in *Sosna* v. *Iowa*, 419 U.S. 393, 406 (1975):

> State statutes imposing durational residency requirements were of course invalidated when imposed by States as a qualification for welfare payments, *Shapiro* [v. *Thompson*, 394 U.S. 618 (1969)], and for voting, *Dunn* [v. *Blumstein*, 405 U.S. 330 (1972)], and for medical care, [*Memorial Hospital* v.] *Maricopa County*, [415 U.S. 250 (1974)]. But none of these cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed. What those cases had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or record-keeping considerations which were held insufficient to outweigh the constitutional claims of the individuals. But Iowa's divorce residency requirement is of a different stripe . . . .
>
> Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience. . . .

It must be emphasized that the instant case involves no "durational residence" requirement at all. And it is evident that the *Shapiro, Dunn,* and *Maricopa County* cases, far from casting doubt on nondurational residence requirements, lend credence to them.

Thus, what we have here is only a residence requirement which creates no racial classification, affects no First Amendment rights, and is not concerned with any "fundamental rights." See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973). The appropriate Equal Protection standard calls for a determination only of whether the Virginia classification "is reasonable." We submit that there should be no doubt that it is supported in reason.

As for tidewaters or inland waters such as those regulated by Virginia Code § 28.1-60, the paramount interest of the states has been long established by the decision of this court in *McCready* v. *Virginia*, 94 U.S. 391 (1877). *McCready* held that Virginia's ownership of the riverbeds, waters and fisheries resources therein was a valid basis upon which to exclude nonresidents from taking commonly owned property of the state. *McCready* is the only case in which this Court has addressed the issue of the states' authority to exclude non-residents from exploiting resources in inland waters. Its premise that a state owns the resources within its inland waters has been given renewed vitality by Congress in the Submerged Lands Act.

Virginia Code § 28.1-60 was enacted by the legislature with knowledge of the nature of menhaden, the economic importance of the menhaden industry, and the necessity to effectively conserve this important resource. As set out previously, it is against a young fishing stock that the Virginia menhaden effort is directed. Virginia menhaden producers, the Virginia Institute of Marine Science and the National Marine Fisheries Service carefully monitor the menhaden

catch; the producers then adjust the season and fishing effort as necessary to conserve the resource. Virginia alone among the Atlantic states imposes seasonal limits on fishing for menhaden, limitations on net mesh size, and protects selected waters for small fish development. The purse seine used to take menhaden is a highly efficient method of taking large schools of fish. For this reason, Virginia has restricted the minimum size of net mesh used in the purse seines in order to insure sufficient escapement of the smaller fish. Such escapement is vital to the goal of maintaining level stocks from year to year because it insures that sufficient numbers will survive to spawn. Without residual stocks of fish to reproduce and have their offspring return, the resource in Virginia would become rapidly and dangerously depleted.

An important factor in net size regulation is the particular difficulty in its enforcement. During the menhaden season, boats are scattered throughout the Bay and coastal waters often leaving and returning to port in the hours of darkness. Therefore, boarding boats for inspection while actively fishing or under way is not a practical method of enforcement. Aerial surveillance is ineffective for net size enforcement. The only feasible means of enforcing the net size regulation is inspection of vessels while gathered in port. Such local dockside inspections would be impossible if non-resident vessels were fishing in the Bay and landing the catch outside of Virginia.

The foregoing facts lead to the following conclusions: (1) Because the fishing in the Chesapeake Bay is oriented against a young rather than mature fish, a highly effective regulatory system capable of maximum enforcement is required; (2) The net size regulation, which is central to the conservation effort, is practically unenforceable against non-residents; and (3) Non-residents lack the motivation derived from natural self-interest to preserve local fishery stocks and would tend to seek the most immediately productive

method of fishing without regard for the long term consequences of their acts. Those conclusions are entirely reasonable and amply support the validity of Virginia's effort to manage and conserve an economically significant and delicate fishery resource.

We submit that the reasons shown for the enactment of Section 28.1-60 are valid and sufficient to satisfy the tests established by this Court.

B. Virginia Code § 28.1-81.1 Is A Valid Exercise Of The State's Police Power To Regulate And Conserve Its Fisheries Resources And Is Permissible State Regulation Under The Fourteenth Amendment.

Virginia Code § 28.1-81.1 denies the issuance of a commercial fishing license for the taking of food fish or menhaden in Virginia waters to any person, partnership or corporation not a citizen of the United States. The statute provides a definition for a citizen corporation based on the percentage of control and stock ownership by United States citizens.

The lower court held with respect to this provision that federal law had preempted the states' control of commercial sea fisheries and pointedly did not reach the equal protection issue raised by plaintiffs below.

The portion of the Virginia Code addressed here, § 28.1-81.1, is attacked by Appellees on Equal Protection grounds because it purports to classify American citizens differently from aliens. It is important to recognize, however, that Appellees' exclusion from the Virginia fisheries was not based on the general provision for exclusion of aliens, but rather because they fell into the category of a foreign-owned corporation. The question presented here, then, is not whether any alien may be denied a license but whether these foreign-owned corporations may be denied a license.

As this Court only recently emphasized, in *Hampton* v. *Mow Sun Wong*, 44 L.W. at 4740 n. 20:

> [T]he holding [in *Sugarman* v. *Dougall,* 413 U.S. 634 (1973)] did not preclude individualized determinations that particular persons could be refused employment on the basis of noncitizenship, or that citizenship could be required as a qualification for appropriately defined classes of positions. See 413 U.S., at 646-647.

It is that kind of question that is presented here. Whether there was a valid state policy that could justify exclusion from territorial waters of the Appellees, foreign-owned corporations who do not qualify as aliens subject to the protections emanating from the Naturalization Clause of the Constitution.

Recent cases in this Court dealing with discrimination against aliens are not applicable in the context of this case, where ample grounds are available to the State for justifying its policy of exclusion of foreign-owned corporations, *Graham* v. *Richardson, supra, In Re Griffiths,* 413 U.S. 717 (1973), and *Sugarman* v. *Dougall, supra.* The *Graham* case dealt with an Arizona requirement of a fifteen year residence in order to qualify for state welfare benefits. There this Court, while treating aliens as a suspect classification, meticulously avoided abolition of the substantial state interest doctrine in contexts other than that of welfare benefits. 403 U.S. at 374.

Similar limitations can be applied to *Sugarman, supra,* and *Griffiths, supra.* Both of these cases dealt specifically with an individual's right to employment; *Sugarman* concerned a New York statute excluding aliens from state civil service positions; *Griffiths* concerned a Connecticut court rule denying an alien resident admission to the bar. Again, the Court was careful to repeat that the substantial state interest doctrine has continuing validity in contexts other than those involving the individual's right to employment.

Great reliance has been placed upon *Takahashi* v. *Fish and Game Commission, supra,* by this Court in the cases noted above. It must be emphasized not only that Virginia Code § 28.1-81.1 is devoid of the racial overtones

which affected the California law in *Takahashi,* but also that the climate surrounding the issue of conservation has undergone radical changes since 1948 when that decision was handed down. Indeed, the frontier mentality which envisioned inexhaustible natural resources has been almost altogether replaced. See generally, *Department of Game of Washington* v. *Puyallup Tribe,* 414 U.S. 44 (1973) and *Corsa* v. *Tawes,* 149 F.Supp. 771 (D. Md. 1957).

The standards applicable to Virginia Code § 28.1-81.1 in this equal protection challenge are the time-honored measures for laws regulating economic and business activities as set forth in Part II A., *supra.* Only in cases where *individual* rights are concerned has a majority of this Court deemed it necessary to apply a higher standard of review to laws classifying in terms of alienage. *Graham* v. *Richardson, supra; In Re Griffiths, supra; Sugarman* v. *Dougall, supra.* The instant case, however, involves a challenge to a law regulating commercial activity by a *corporation* denied the right to participate in such activity because it has been classified a non-citizen. In no case dealing with classifications between citizen and non-citizen corporations has this court called for a showing of a compelling state interest.

Therefore, the summarized standards by which Virginia Code § 28.1-81.1 must be reviewed are: (1) The Classification must be on grounds relevant to the state's objective; (2) The statute is presumed to be constitutional and will not be set aside if any state of facts reasonably may be conceived to justify the classification therein; (3) The state's objectives and the classification must be considered in the context of the fisheries in Virginia waters, the dangers posed by foreign fishing practices, the long history of Virginia's regulation of these natural resources, and the difficulty of enforcement of such regulations against determined efforts to overfish.

Whereas native fishermen traditionally rely upon the local stock for their livelihood, the alien controlled oper-

ators have no such vested interest in the conservation of those stocks. Indeed, it is apparent from the pattern of foreign fishing in the past that maximum immediate harvest is the sole objective of these foreign operations. The pattern of foreign interests fishing off our coasts has been to move into fisheries, take as many fish as possible without regard for the capacity of the fish to reproduce, and then, once the fisheries have been exhausted, to move on to still other waters to repeat their depredations. Virginia has experienced the damaging effect of intensive foreign fishing efforts off her coasts. The river herring industry, once directly supportive of the employment of thousands of Virginians and a healthy fisheries resource for more than 100 years, was destroyed in a commercial sense when the Soviet fishing fleet directed its efforts against it. These facts have been amply documented in hearings on the 200 mile limit bill conducted by Congress in Washington and in many coastal states, including Virginia,[5] and were incorporated in the congressional findings in the preface to the Fisheries Conservation and Management Act of 1976, set out in Appendix E.

Under the traditional equal protection standards, Virginia Code § 28.1-81.1 is presumed to be constitutional and will not be set aside if any set of facts reasonably may be conceived to justify the classification therein. Considering the overwhelming evidence of foreign interests practicing predatory fishing practices off our coasts, the Virginia legislature could reasonably have sought to protect its fisheries on the grounds (1) That foreign interests controlling a U.S. corporation with vessels fishing in the Virginia waters would lack long-range motivation to conserve the resource; (2) That foreign interests would continually attempt to maximize short-term profits from their investment; (3) That this

[5] Hearings on Extending the Jurisdiction of the United States Beyond the Present Twelve Mile Fishery Zone, Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 93rd Cong., 2nd Sess., (1974).

desire to maximize profits coupled with no interest in conservation would lead to overfishing and disregard for regulations largely dependent upon voluntary compliance; (4) That with the imminent enactment of the 200 Mile Limit Bill and other pressures upon foreign fishing vessels in United States waters, foreign fishing interests would seek to obtain U.S. shell corporations through which to document vessels in the fisheries reserved for Americans in view of the lack of effective legislation prohibiting such techniques; (5) That because of the long-term economic advantage in conserving fishery stocks, United States corporations engaged in fishing would abide by conservation measures and would not be motivated by short-term profit to overfish the resource. These afford rational bases upon which the classification between citizen and non-citizen was made. The discrimination against non-citizen corporations was not based on prejudice or whim but a singular desire to conserve and protect the bounty of the fisheries resources within the Virginia territorial waters. The classification is reasonably related to this objective and should be upheld.

CONCLUSION

The taking of fish from state waters is not an incident of interstate commerce, and in all events the Virginia statutes in dispute relating to the taking of such fish do not impose an undue burden upon interstate commerce in violation of Article I, Section 8 of the United States Constitution.

Neither the Bartlett Act (16 U.S.C. § 1081, *et seq.*), nor other controlling federal law, preempt the power of individual states to regulate fisheries in their marginal seas or inland waters. Neither Virginia Code § 28.1-60 restricting menhaden fishing in the Chesapeake Bay to residents of Virginia nor Virginia Code § 28.1-81.1 preventing the issuance of licenses for commercial fishing to foreign-owned corporations violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

For the foregoing reasons, the judgment of the United States District Court for the Eastern District of Virginia should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Supremacy Clause, U.S. Const. art. VI, ¶ 2

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Equal Protection Clause, U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 U.S.C. § 1081

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental

Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Nothwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Va. Code § 28.1-60

Non-residents generally.—(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Va. Code § 28.1-81.1

Licenses for taking fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of

its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

APPENDIX B

STATEMENT BY AMMON G. DUNTON, JR., ESQUIRE, BEFORE THE SENATE COMMITTEE ON AGRICULTURE, CONSERVATION, AND NATURAL RESOURCES

January 27, 1975

Mr. Chairman, members of the Committee, I am Ammon G. Dunton, Jr., a member of the firm of Dunton, Simmons & Dunton. We act as counsel for Zapata Haynie Corporation, a Virginia corporation and a major participant in the American menhaden fishing industry.

I assisted Senator Manns in the drafting of S.B. 941. It has been reviewed by Commissioner Douglas, who is here to testify in support of this legislation.

The bill would prohibit the licensing of foreign nationals (whether they be acting as individuals, partners, or controlling elements of corporations) from engaging in the taking of commercial fish from the waters of the Commonwealth.

Paragraph (a) of the first section of the bill sets forth the words of prohibition, and the fact that the requirement that licenses be granted only to U.S. citizens does not eliminate any other requisite to the issuing of licenses as required by the Code.

Paragraph (b) defines a corporation deemed a U.S. citizen.

Paragraph (c) sets forth provisions designed to eliminate evasion of the 75% ownership requirement. These are taken from the federal Shipping Act of 1916 definition of corporate citizen, which has been found to be effective through the years.

Section 2 of the bill declares an emergency to exist.

Evidence taken around the country in the hearings on the 200 mile limit bill now pending before the Congress in

Washington has established that American fisheries should be reserved for American citizens because they alone have the true incentive to conserve and maintain our domestic fishery resources. The American fishing industry, particularly the menhaden segment, has exhibited a fiduciary quality with respect to the management of its fishing effort. American menhaden companies have assisted in studies regarding the life cycle and movement of menhaden and have responded to requests from the National Marine Fisheries Service for reduction in fishing efforts in certain years. As a result the present menhaden stocks are relatively plentiful in areas where foreign fishing has not interfered with the resource, such as in the Chesapeake Bay and in portions of the Gulf of Mexico. On the other hand, where foreign vessels have harvested unknown amounts of unknown species, which we suspect include substantial quantities of menhaden, large scale reductions in the availability of fish have occurred. It is, I believe, fair to say that these foreign vessels are not motivated by a desire to preserve fishing stocks, but instead engage in "strip fishing" which produces large short-term profits but destroys the resource.

The present law in Virginia, contrary to most impressions, does not reserve our domestic fisheries resource to U.S. citizens in all cases.

The simplest means by which foreign owners can fish within Virginia waters is to acquire a Virginia corporation having American documented vessels. While it is true that foreign built or documented vessels will not be permitted to fish within Virginia waters, foreign owned American vessels can.

Within the past few months the control of approximately one-third (⅓) of the American menhaden vessels has passed to foreign interests; and despite objections raised by other American participants, unconditional approvals of

these sales were granted by the present Administration in Washington, ostensibly because there were no clear federal legislative provisions to the contrary. Similarly, a major portion of the American salmon fleet on the west coast has recently been acquired by Japanese interests, in that instance without so much as a hearing being permitted in order to allow American industry to object. The transactions I have referred to are the sale of the Smith group of companies to Hanson Trust and the sale of Whitney-Fidalgo Seafoods, Inc. to Kyokuyo Ltd. of Japan. These two unconditional sales to foreign interests (although conditions might have been imposed by the Maritime Administration) have allowed substantial foreign entry into the American fishery itself for the first time. Here in Virginia, I understand Japanese investment has been made in the lobster industry. Furthermore, these foreign interests can expand their position almost without limit, and can profit from the transactions by disposing without notice to anyone of their stock investments to other foreign interests who then will also have established positions within the American fishery.

As an example, I will give you a hypothetical situation which could occur under existing federal and Virginia law as it is presently being interpreted by the administrative agencies involved. Hanson Trust, through intermediary American corporations, has acquired sixty-eight American menhaden vessels licensed for use in the American fishery. If Hanson should retain approximately one-half of the vessels for its own use, as it has stated it intends to do, it could sell the stock of a corporation owning the balance of vessels to a company controlled by, for instance, Russians. The Russians, in turn, could fit the vessels out for fishing and enlarge them if they saw fit, and fish with impunity within the Chesapeake Bay.

It is true that American masters and watch officers must be in charge of the vessels and the vessel owning corporation would need some American nationals as officers and directors; but it is quite possible to find American citizens who are willing to serve in these capacities if sufficient compensation is paid. Also, theoretically, it is true that the same laws affecting the taking of fish by Americans would apply to the Russian operators. In point of fact, enforcement of fishing laws and regulations would be difficult in the face of any determined effort to overfish by any particular organization.

The practical answer to the problem is to adopt legislation clearly prohibiting the issuance of licenses for the taking of commercial fish from Virginia waters if the persons to whom the licenses would be issued are controlled, directly or indirectly, by foreign nationals. The enactment of such legislation would implement the long standing federal and state policy of reserving the American fisheries for American citizens.

I strongly urge the adoption of S.B. 941 on an eme. gency basis.

I thank you for the opportunity to appear before you today and to present these comments.

APPENDIX C

ZAPATA HAYNIE CORPORATION STATEMENT BY ALLEN W. HAYNIE, PRESIDENT OF ZAPATA HAYNIE CORPORATION, BEFORE THE HOUSE OF DELEGATES COMMITTEE ON THE CHESAPEAKE AND ITS TRIBUTARIES

February 14, 1975

Mr. Chairman, members of the Committee, I am Allen W. Haynie of Reedville, Virginia, and I serve as President of Zapata Haynie Corporation. I am grateful for this opportunity of appearing today to present my views and support of Senator Manns' Bill to restrict the issuances of licenses for the taking of commercial fish to the citizens of the United States.

Our company is a part of the menhaden industry. Our plants are located on the Atlantic and Gulf coasts and we produce fish meal, fish oil, and condensed and/or dried fish solubles.

The menhaden fishing fleet in the United States numbers approximately 125 to 140 vessels which range in size from 140 to 185 feet in length. They carry a crew of 17 men each and together with supporting processing plant and shore-side crews, the industry's employment totals between 5,000 to 6,000. Our company operates 36 vessels, 25 airplanes, 5 plants and employs about 1,300 people of which approximately half are Virginians.

In addition to our menhaden operation, our company previously conducted operations in the river herring fishery until the resource was destroyed by foreign off-shore fishing. We dismantled our plant, sold our equipment and vessels, and discontinued operations some months ago.

Dr. Jackson Davis of the Virginia Institute for Marine Science states, in one of his reports to our trade association about 1965, that the river herring resources had remained in

a very healthy and stable condition for about 100 years, and was perhaps the most stable resource along the Atlantic coast. It was about 1966 that the foreign off-shore fishing fleets began to operate south of Ocean City, Maryland; and I personally stated at that time to Ambassador Donald McKernan, who was Special Assistant for Fisheries to the Secretary of State, that if this great foreign fleet continued to fish on the river herring resource, it would be extinct within 5 years. Several bi-lateral agreements negotiated by our State Department made very feeble and non-productive attempts to discourage foreign fishing of this resource, and as stated earlier, it no longer exists in quantities justifying commercial ventures of any size. Because of this, our canning operation, which was established at Mundy Point, Virginia, to process river herring in 1880, has been closed. It employed 300 persons in 1965. (Attachment A—Chesapeake Fisheries Historical Catch Statistics, Alewives, 1880-1972).

It is our opinion that due to inadequate government surveillance, we are unable to determine the extent to which foreign fishing has affected our menhaden resource. A very large Russian purse seine fleet has been developed and has been operating on the Atlantic during the past 3 years. (Attachment B—National Marine Fisheries Service Surveillance Report). This new purse seine capacity of the Russians, employing large vessels capable of operating the largest kind of purse seines, is perhaps as great, if not greater, than that of the entire U.S. menhaden fleet.

For the last 50 years very large schools of menhaden have migrated from the northeast, the Jersey coast and the Chesapeake Bay south to the Carolinas, where a fishery had been successfully conducted during November and December in the Beaufort-Morehead City, North Carolina area. While some say it is merely a coincidence, I believe

that the existence of this Russian purse seine fleet is the reason that the fish have not reached North Carolina in commercial quantities during the past 3 years. The Russian seiners operate in the migratory path of the menhaden. Where there were 5 plants operating in North Carolina in the 1960's only 1 now continues and this on a small scale.

Although foreign fishing effort has seriously depleted marine resources beyond our territorial sea, such foreign effort has not yet been undertaken in substantial quantity within our territorial waters or the Chesapeake Bay. It has come to our attention that by means of the use of a shell corporation owned entirely by foreign nationals and the use of American flag vessels, foreign interests can, if they so desire, fish within the Chesapeake Bay and within the territorial waters of this Commonwealth. I feel that any such foreign fishing effort within our waters would be seriously detrimental to the interests of the citizens of this country and this state. I feel that this loophole should be closed by appropriate emergency legislation.

In my opinion, the United States has become a second-class fishery nation which, to a great extent, is a result of this unwarranted foreign destruction of fisheries off our coast. In excess of 75% of the fin fish caught off our coast are caught by foreign fisherman. Only 25% is still controlled by U.S. fishermen. Menhaden represents more than 40% of the total tonnage of fin and shell fish landed by U.S. fishermen.

Therefore, after giving this matter serious deliberation, I urge your support and passage of this vital legislation.

[Note: The attachments referred to in the foregoing statement are set forth in full in the Appendix to the Brief Amici Curiae in support of Statement as to Jurisdiction filed in this Court on behalf of Virginia Seafood Council *et al.*, on March 8, 1976 at pages App. 24-31.]

APPENDIX D

U.S. Department of Commerce
Maritime Administration
Washington, D.C. 20230
Transfer Order No. MA-13410
Approving the Sales Alien of the Oil Screw
Ringold Bros.

Whereas, An application has been filed by Richard Reiss, New York, New York, for the approval required by Sections 9 and 37 of the Shipping Act, 1916, as amended (46 U.S.C. 808 and 835), of the sale of the oil screw Ringold Bros., Official No. 209216, to Seacoast Products, Inc., a Delaware corporation but not a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916 as amended:

It Is Ordered, This 6th day of May, 1974, that the approval required by Sections 9 and 37 of the Shipping Act, 1916, as amended (46 U.S.C. 808 and 835), of the sale of the oil screw Ringold Bros., Official No. 209216, to a domestic alien controlled corporation, as above set forth, be, and it is hereby granted; and

It Is Ordered Further, That this approval shall be null and void unless the sale alien, hereby approved, is effected within one year of the date of such approval.

Administrator
Maritime Administration

/s/ VIRGINIA J. O'BRIEN
Virginia J. O'Brien
Assistant Secretary

USCOMM-MA-DC

APPENDIX E

Section 2(a)(1-5) of Fisheries Conservation and Management Act of 1976, Public Law 94-265, 90 Statutes 331(2)(a)(1-5)

CONGRESSIONAL FINDINGS OF FACT

The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis. . . .

Supreme Court, U. S.
FILED
JUN 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE

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INTERESTS OF THE STATE OF MARYLAND, AMICUS CURIAE

The interests of Maryland have been specified in its Brief in Support of Statement as to Jurisdiction. It is not necessary to repeat the factual analysis offered in that statement, but only to emphasize that Maryland's interests are concentric to Virginia's because of both the similarity of its fishery laws and the hydrologic relationship by means of the Chesapeake Bay.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on November 7, 1975. Copies of the opinion and final order are attached hereto as Appendix A.

JURISDICTION

The opinion of the three-judge District Court was entered on November 7, 1975. Appellant filed notice of appeal on January 5, 1976 in U.S. District Court for the Eastern District of Virginia. The jurisdiction of the Supreme Court to review this decision by appeal is pursuant to 28 U.S.C. §1253. This Court noted probable jurisdiction on April 26, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, §92, the Equal Protection Clause, Amendment XIV, §2, the Privilege and Immunity Clause, Article IV, §2, and the Interstate Commerce Clause, Article I, §8. The Federal statutory provisions are 43 U.S.C. §1301 *et seq.*, 16 U.S.C. §1081, 16 U.S.C. §1091, Public Law 94-265 (16 U.S.C. §1801 *et seq.*) effective April 13, 1976, and Virginia Code §§28.1-60 and 28.1-81.1.

QUESTIONS PRESENTED

1. May a state, in order to conserve and maintain a viable commercial fishery, limit commercial harvesting on a residency or citizenship basis?

2. Does 16 U.S.C. §1081 preempt the Virginia Statutes which were enacted under its police power to manage and conserve a fishery resource within its jurisdictional boundaries?

STATEMENT

The State of Maryland adopts the statement of the case contained within the brief of Appellant.

ARGUMENT

The subject Virginia Statutes effectively preclude commercial fishing in both the territorial sea and the inland waters of Virginia by foreign corporations.[1] The primary thrust of §28.1-60 of the Virginia Code prohibits commercial fishing in any Virginia waters by nonresidents for the purpose of converting the fish into oil, fish scrap, fish meal or guano. An exception is provided which would allow nonresident persons or corporations to catch menhaden within the territorial sea off the coast of Virginia. However, in light of the March 19, 1975 enactment of §28.1-81.1 of the Virginia Code, Appellees cannot qualify for the exemption since all commercial harvesting under the general statute is reserved to citizens of the United States.

While the decision below was ostensibly based on determinations of preemption and equal protection, neither doctrine applies to the situation at hand. During the pendency of this action, the Bartlett Act, 16 U.S.C. §1081 *et seq.*, was repealed by the enactment of 16 U.S.C. §1801 (The Fishery Conservation and Management Act of 1976) which further acknowledges the states' role in regulating the fishery within the territorial sea.

[1] Although the Statutes affect alien individuals, the corporate status of Appellees may not present that issue for adjudication.

I.

THE SUBJECT STATUTES ARE A VALID EXERCISE OF THE POLICE POWER NOT UNDULY BURDENING INTERSTATE COMMERCE.

The environmental awakening of the past decade has focused this nation's attention on the conservation of our natural resources. The need to maintain a viable commercial and sports fishery has coalesced economic, political and social concerns into the conservation movement.

The recognition of a declining fishery[2] has generated attempts both at the international, national and state levels to fashion new practices to deal with these problems. The states, however, must rely upon the traditional police power which is an everchanging exercise by the states, attempting to deal with unique everpresent exigencies. It does not remain static, it changes with the times. *See Berman v. Parker*, 348 U.S. 26, 32 (1954). The State possesses broad powers to regulate its waters and to conserve the natural resources lying therein. *See Maryland v. Amerada Hess*, 350 F. Supp. 1060 (D. Md. 1972). It may regulate the menhaden fishery. *See also Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957), Aff'd 355 U.S. 37 (1957) (per curiam).

Virginia has shown a reduction in its commercial fishery harvest which coincides with Maryland's. Although foreign fishing pressure is not the sole cause for the drop, it is a cause strongly recognized by the Federal government. Foreign fishing fleet practices have proven too efficient for the available resource. If, indeed, the Virginia statutory scheme presents a burden

[2] For a brief historical view of Virginia's fishery, see Flaherty, "Virginia and the Marginal Sea, An Example of History in the Law", 58 Va. L. Rev. 694, April, 1972.

to interstate or foreign commerce, under the facts, the burden is justifiable. It is clearly permissible for state legislation to effect foreign or interstate commerce without burdening it. *New York, ex rel., Silz v. Hesterburg,* 211 U.S. 31 (1908) concerned a New York statute aimed at protecting state game by prohibiting the sale of any such game out of season, even if the source of the game sold was out of state or foreign. The case arose from the possession for sale of a grouse from Russia in New York City. The Court upheld the New York statute as a reasonable exercise of the state's police power, having only indirect interference with foreign commerce.

Even a "material" interference with interstate commerce is acceptable when protecting areas of local interest including rivers, harbors, piers, docks, quarantine regulations, and game laws. *See South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 178 (1938); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and local safety measures are *presumed* to be valid. *Id.* at 524.

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), the Court enunciated the burden tests, stating that:

> . . . it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' *Id.* at 443, 444.

The Court had previously declared that legislation which attempts to prevent or minimize air pollution:

> . . . clearly falls within the exercise of even the most traditional concept of which is compendiously known as the police power. In the exercise of that power, the States and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. Citing *Gibbons v. Ogden*, 9 Wheat 1 (1824); *Cooley v. Board of Wardens*, 12 How 299 (1851).

In the event the proscriptions of the Virginia law affect interstate or foreign commerce, that is a purely incidental result of the legislation. The primary expressed purpose of the action falls within the traditional police power framework. It is designed to relieve harvesting pressure on the natural resources within the State of Virginia. *See Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936).

In the absence of prevailing, preclusive Federal fishery legislation for the territorial sea zone, the subject Virginia statutes do not even approach an unconstitutional interstate or foreign commerce burden. In *Corsa v. Tawes, supra*, Judge Sobeloff ruled that the proscription for purse seining in the territorial zone did not prevent the fleet from fishing beyond the zone or in other areas, and, therefore, any effect to commerce was "purely incidental". The regulation was a valid exercise of local sovereignty recognized as valid by the Federal Congress. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1915).

II.

16 U.S.C. §1081 DID NOT PREEMPT VIRGINIA'S VALID EXERCISE OF THE POLICE POWER.

The Court below held that the Bartlett Act, 16 U.S.C. §1801, pre-empted Virginia's control of commercial sea fisheries citing as support for that proposition *Toomer v. Witsell*, 334 U.S. 385, 402 (1948); *U.S. v. California*, 332 U.S. 19 (1947); *Skiriotes v. Florida*, 313 U.S. 69 (1941); and *Manchester v. Massachusetts*, 139 U.S. 240 (1891). Each of these cases, decided prior to the passage of the Submerged Lands Act of 1953, 43 U.S.C. §1301 *et seq.*, evinces the holding that a State possesses regulatory control over the natural resources lying within its boundaries. The Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, enforces the recognition that management and use of the submerged lands and natural resources is a state prerogative within the 3 mile territorial sea. *Corsa v. Tawes, supra*; *State v. Norton*, 335 A.2d 607 (S. Ct. Me. 1975); *U.S. v. F/V Taiyo Maru No. 28 S01-600*, 395 F. Supp. 413 (D. Me. 1975).

The language contained within 16 U.S.C. §1081 does not set forth a scheme of regulation so pervasive that it forecloses the exercise of state police power. Nor do the facts in this case show how the exercise of this local authority is inconsistent with §1081. The issuance of certificates of enrollment and licenses for the Seacoast vessels, pursuant to 46 U.S.C. §§808 and 835, and the subsequent Coast Guard licensing does not shield those vessels from the regulatory action of the respective states. *Huron Portland Cement Co. v. City of Detroit, supra. See also Askew v. American Waterway Operators*, 411 U.S. 325 (1973).

The aforesaid issue, however, may now be moot for as noted above, Public Law 94-265 became effective on April 13, 1976. §402 of that act repealed 16 U.S.C. §§1081-1086 and 16 U.S.C. §§1091-1094 *et seq.*

The zone of primary regulation (Fishery Conservation Zone) established under §101, 16 U.S.C. §1811, does not include the territorial sea. The United States, through the Secretary of State, may approve fishing rights in the zone for foreign nations with which the United States has a governing international fishery agreement. Management programs within the Federal zone will be promulgated by the requisite council composed of fishery management personnel from both the Federal and State governments. Section 306 of the act, 16 U.S.C. §1856, provides that nothing in the act will extend or diminish the authority of any state within its boundaries. This recognizes the prerogatives of the various coastal states within the 3 mile territorial sea.

The Fishery Conservation and Management Act of 1976 relies upon State programs within their respective jurisdictional boundaries. The Virginia Statutes in anticipating the passage of the Federal legislation are supportive of the scheme of management set out in the Federal legislation for if foreign fishing is limited within the Fishery Conservation Zone, it would be inconsistent with that effort for States to allow foreign fishing interests to commercially harvest within the 3 mile area.

III.

THE COMMONWEALTH OF VIRGINIA MAY PROTECT AND MAINTAIN ITS FISHERY RESOURCES BY UTILIZING DIFFERENT COMMERCIAL FISHERY CLASSIFICATIONS FOR RESIDENTS, NONRESIDENTS AND ALIENS.

The Court below held that the Virginia Statutes violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The basic test in determining whether a law is violative of that provision is whether or not the chosen classification is without any reasonable basis it seeks to serve. *See McGowan v. Md.*, 366 U.S. 420 (1961). The validly enacted legislation carries with it the presumption of correctness. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The Court should honor the presumption that the State legislature has passed a constitutional statute in proscribing certain activities within its boundaries. The Honorable Chief Justice observed in a recent obscenity case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), as follows:

> . . . It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional cases where that legislation plainly impinges upon rights protected by the Constitution. *Id.* at 60.

Illustrating this principle, the Chief Justice stated:

> . . . when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-420, 91 S. Ct. 814, 834-826 (1971). *Id.* at 62.

Although Appellees have clear standing to raise the alien issue which prohibits their ability to commercially fish for menhaden within the 3 mile limit, it is unclear whether the nonresidency issue has also been presented. If viewed in a true equal protection context, the issue presented is whether the separate classification of foreign fishery interests serves a valid basis to attain the goal of fishery conservation. The findings provisions within the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.*, express the reasoning behind this classification, since it also serves as the foundation for restricting foreign fishing vessels from the Fishery Conservation Zone. Congress determined that those species of fish which live in the continental shelf and those andromous species spawning in tidal estuaries are valuable natural resources which contribute to the food supply, economy and health of the nation and provide recreational opportunities. Congress recognized that because of increased fishing pressure the survival of certain stocks of these fish are threatened and that commercial and recreational fishing is a major source of employment for the United States. Certain coastal areas are more dependent on the fishery resource than others and the "massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, and interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen". Congress further stated that the fishery resources are finite and renewable and that a national program for conservation and management programs is necessary to protect against overfishing and to insure conservation.

The primary goal of Public Law 94-265 is to conserve the national fishery resource by preventing overfishing by foreign interests. This is now a recognized national

goal. It is difficult to understand how the same classification to accomplish the same goal, within Virginia's boundary can be construed as violative of equal protection.

Substantial reliance has been placed below on *Toomer v. Witsell, supra*, which seemingly departed from *McCready v. Virginia*, 944 U.S. 391 (1877). That decision, however, was based upon application of the Privileges and Immunity Clause which required that equal treatment be afforded Georgia commercial fishermen while in the State of South Carolina. This case was decided shortly after this Court's decision in *U.S. v. California, supra*, which held that California did not own the waters offshore its coast nor have a proprietorship interest in the natural resource located therein. This lack of a proprietorship interest was recognized in *Toomer:*

> The fact that it is actively in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownership doctrine. While *United States v. California*, 332 U.S. 19 (1947), as indicated above, does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired "ownership" of the three-mile belt. *Id.* at 402.

The Court then distinguished *McCready* on two counts: 1) that the *McCready* opinion dealt with sedentary shellfish as compared to the free-swimming shrimp which migrate through the waters of several states; and 2) *McCready* dealt with the regulation of fishing in inland waters as compared to shrimping in the territorial sea.

Arguably *Toomer* would have been decided differently if it surfaced subsequent to the enactment of the

Submerged Lands Act in 1953, 43 U.S.C.A. §1301 *et seq.* This Act conferred, confirmed and established the management and use of the submerged lands and natural resources into the respective coastal states and, therefore, serves as a jurisdictional basis for the assertion of State prerogatives within the three-mile belt. *See U.S. v. Maine*, 420 U.S. 515 (1975); *see also State v. Norton, supra.*

It should be noted, however, that the protection of the privileges and immunity clause is only extended to citizens of the United States and is not applicable to foreign-owned corporations. *See Matthews v. Diaz*, 44 Law Weekly 4748 June 1, 1976, fn. 12.[3] Because corporate control may technically rest in foreign interests, the equal protection provisions also may not be available.[4] Irrespective of the applicability, when reviewing and weighing the reasonableness of a classification in terms of the goal it seeks to attain, the character of the classification and the individual interests affected by the classification must be considered by the Court. *See Dunn v. Blumstein*, 405 U.S. 330 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *note* "The Decline and Fall of the New Equal Protection," 58 Va. L. Rev. 1489, Nov. 1972.

Given the propriety of the classification and the goal it seeks to serve, the basic individual interests which would be affected by striking down the Virginia Statutes would be those of resident commercial harves-

[3] Those cases which afford the Equal Protection Clause sanctions to legislation affecting resident aliens, emphasize the *nexus* of the aliens to the State, i.e., the payment of taxes, service in the armed forces and their contribution to the economic growth of the jurisdiction. *See Graham v. Richardson*, 403 U.S. 365 (1971).

[4] *Edwards v. Leaver*, 102 F. Supp. 698 (1952) involved a "Smith Meal Company", however, the issue of foreign control was not present or discussed.

ters and those citizens which are interdependent upon the local fishery industry. Mr. Justice Frankfurter's concurring opinion in *Toomer v. Witsell, supra,* acknowledges:

> A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.
>
> When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over their fisheries, and it is this common understanding that was reflected in *McCready v. Virginia*, 94 U.S. 391, 24 L. Ed. 248. The McCready Case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the McCready doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the *McCready doctrine by referring to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." *Truax v. Raich*, 239 U.S. 33, 39, 40, 60 L. Ed. 131, 134, 135, 36 S. Ct. 7, LRA 1916D 545, Ann. Cas. 1917B 283. *Id.* at 408, 409.

Based upon this language, the Maryland Court of Appeals does not consider the McCready doctrine to have expired subsequent to the announcement of *Toomer v. Witsell* by this Court.

> In evaluating *Toomer v. Witsell*, we do so within the frame of reference as to what may be discriminatory regulations regarding commercial fishing

> rights in the marginal sea bounding the coastline of a state, and would not deem it authority out of such context. Additionally, although Professor Power in his article pronounced *McCready* functionally dead", we, in view of the life breathed into it in the concurring opinion in *Toomer v. Witsell*, consider it still among the quick and will continue to do so until its obituary appears among the Supreme Court Reports.

Bruce v. Dir., Chesapeake Bay Affairs, 261 Md. 585, 611 (1971).

Furthermore, the classifications based upon residency are not *per se* violative of equal protection. Virginia, in fact, has indicated the existence of other methods of protecting the commercial fishery by regulating the net size used by fishermen. Maryland law, while also classifying nonresidents differently from residents, has adopted a comprehensive scheme of fishery management which involves limitations placed upon net licensing whereby pound nets and haul seines are limited to specific sizes and legnths.[5] Catch limits are also imposed on shellfish.[6] These controls along with residency restrictions are part of a comprehensive scheme seeking to maintain a viable fishery while satisfying the known demands placed upon it.

CONCLUSION

The Federal government has recognized that the exclusion of foreign fishing interests from a zone 197 miles wide offshore this nation's coast is necessary as a fishery conservation measure. Lying between the Federal Fishery Conservation Zone and the Virginia

[5] *See* §4-704 of the Natural Resources Article, Annotated Code of Maryland (1974 Vol. and 1975 Supp.).

[6] *See* §4-1009 of the Natural Resources Article, Annotated Code of Maryland (1974 Vol. and 1975 Supp.).

shore is a 3 mile territorial sea in which Virginia by the subject statutes has also prohibited alien fishing. Virginia's program, therefore, is consistent with the goals and procedures of the Federal legislation.

This control mechanism is based upon the same rationale that the new Federal act relies upon — that foreign fishing pressures are inimical to the maintenance of a viable commercial fishery. *Toomer v. Witsell, supra*, did not overrule the McCready determination that a state can adopt reasonable measures to protect the natural resources located within it. If the power to adopt these measures is no longer based upon proprietorship theories, it is supportable as a proper exercise of the state's police power. The Submerged Lands Act of 1953 recognizes that states should utilize their prerogatives within the territorial sea and the recent Federal legislation affirms that concept.

Respectfully submitted,

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Appendix A

In The United States District Court
For The
Eastern District Of Virginia
Newport News Division

Civil Action No. 75-69-NN

(Three-Judge Court)

Seacoast Products, Inc., The New Smith Meal Company, Inc. And Second Oceanic Corporation,
Plaintiffs,
v.
James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission,
Defendant.

FINAL ORDER

Upon consideration of the record, including the affidavits filed herein and stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, ADJUDGES, ORDERS and DECREES:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or

any of them of the statutes designated as Code of Virginia, §§28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiff recover their costs of the defendant.

/s/ ALBERT V. BRYAN
Senior United State Circuit Judge

/s/ RICHARD B. KELLAM
United States District Judge

/s/ JOHN A. MACKENZIE
United States District Judge

November 7, 1975.

In The United States District Court
For The
Eastern District Of Virginia
Newport News Division

Civil Action No. 75-69-NN

Seacoast Products, Inc., The New Smith Meal Company, Inc. And Second Oceanic Corporation,
Plaintiffs,

v.

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission,
Defendant.

THREE-JUDGE COURT

Argued: October 15, 1975 Decided: November 7, 1975

Before BRYAN, Senior Circuit Judge, KELLAM, District Judge and MacKENZIE, District Judge.

T. H. Willcox, Jr., of Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Virginia, counsel for plaintiffs; James E. Moore, Assistant Attorney General [Andrew P. Miller, Attorney General], Richmond, Virginia, counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code §28.1-60 and §28.1-81.1. Epitomized, the force of §28.1-60 is to allow a nonresident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of

[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 U.S. 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 U.S.C. 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 U.S.C. 2281 and 2284.

[3] There are no critical, genuine factual differences between the parties.

Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of §28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention have no place. In other circumstances they are appropriate: to obtain interpretation of a State statute, Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 U.S. 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 U.S. 592, 602 (1975); *Younger, supra*, at 53-54; Zwickler v. Koota, 389 U.S. 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff

parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not purposed to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their nonresident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of §28.160.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden nonresidents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 U.S. 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general

> policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

Incidentially, the Court in both *Takahashi, supra,* at p. 420, and in Toomer v. Witsell, 334 U.S. 385, 401 (1948) declined to treat, as *contra*, McCready v. Virginia, 94 U.S. 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, §28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . .", except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 U.S. 385, 393, 394 (1948); United States v. California, *supra*, 332 U.S. 19 (1947); Skiriotes v. Florida, 313 U.S. 69, 75 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 U.S.C. 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 U.S.C. 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-miles sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited — *Toomer, California, Skiriotes* and *Manchester, supra* — determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall and in January move again far out to sea — later to retrace their March-October path. Only in the summer are they to be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes — both of which contain severe sanctions for violations — during the summer by the seizure of even one of plaintiffs'

ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, *supra*, 334 U.S. 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 U.S. 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

APPENDIX B

Supremacy Clause, U.S. Const. art. VI, ¶2

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Equal Protection Clause, U.S. Const. Amend. XIV. §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 U.S.C. §1081

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States has the same rights in respect to fisheries as it has in its territorial

waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

CHAPTER 21A.—FISHERIES ZONE CONTIGUOUS TO TERRITORIAL SEA OF UNITED STATES

Sec.

1091. Establishment; fisheries rights.
1092. Description of boundaries.
1093. Substitution of description of boundaries where conflict of zones or waters.
1094. State jurisdiction over natural resources and waters.

§ 1091. Establishment; fisheries rights

There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

Pub.L. 89-658, § 1, Oct. 14, 1966, 80 Stat. 908.

§1092. Description of boundaries

The fisheries zone has as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.

Pub.L. 89-658, § 2, Oct. 14, 1966, 80 Stat. 908.

§1093. Substitution of description of boundaries where conflict of zones or waters

Whenever the President determines that a portion of the fisheries zone conflicts with the territorial waters or fisheries zone of another country, he may establish a

seaward boundary for such portion of the zone in substitution for the seaward boundary described in section 1092 of this title.

Pub.L. 89-658, § 3, Oct. 14, 1966, 80 Stat. 908.

§1094. State jurisdiction over natural resources and waters

Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or as diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the United States.

Pub.L. 89-658, § 4, Oct. 14, 1966, 80 Stat. 908.

Public Law 94-265
94th Congress, H. R. 200
April 13, 1976

An Act

To provide for the conservation and management of the fisheries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, with the following table of contents, may be cited as the "Fishery Conservation and Management Act of 1976".

Fishery Conservation and Management Act of 1976.
16 USC 1801 note.

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SEC. 2. FINDINGS, PURPOSES AND POLICY

16 USC 1801.

(a) FINDINGS.—The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources.

These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by United States fishermen, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) PURPOSES.—It is therefore declared to be the purposes of the Congress in this Act—

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans

which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska.

(c) POLICY.—It is further declared to be the policy of the Congress in this Act—

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this Act; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

SEC. 3. DEFINITIONS. 16 USC 1802.

As used in this Act, unless the context otherwise requires—

(1) The term "anadromous species" means species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.

(2) The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that—

(i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;

(ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and

(iii) there will be a multiplicity of options available with respect to future uses of these resources.

(3) The term "Continental Shelf" means the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States, to a depth of 200 meters or, beyond that limit, to where the depth of the super-

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jacent waters admits of the exploitation of the natural resources of such areas.

(4) The term "Continental Shelf fishery resources" means the following:

COLENTERATA

Bamboo Coral—Acanella spp.;
Black Coral—Antipathes spp.;
Gold Coral—Callogorgia spp.;
Precious Red Coral—Corallium spp.;
Bamboo Coral—Keratoisis spp.; and
Gold Coral—Parazoanthus spp.

CRUSTACEA

Tanner Crab—Chionoecetes tanneri;
Tanner Crab—Chionoecetes opilio;
Tanner Crab—Chionoecetes angulatus;
Tanner Crab—Chionoecetes bairdi;
King Crab—Paralithodes camtschatica;
King Crab—Paralithodes platypus;
King Crab—Paralithodes brevipes;
Lobster—Homarus americanus;
Dungeness Crab—Cancer magister;
California King Crab—Paralithodes californiensis;
California King Crab—Paralithodes rathbuni;
Golden King Crab—Lithodes aequispinus;
Northern Stone Crab—Lithodes maja;
Stone Crab—Menippe mercenaria; and
Deep-sea Red Crab—Geryon quinquedens.

MOLLUSKS

Red Abalone—Haliotis rufescens;
Pink Abalone—Haliotis corrugata;
Japanese Abalone—Haliotis kamtschatkana;
Queen Conch—Strombus gigas;
Surf Clam—Spisula solidissima; and
Ocean Quahog—Artica islandica.

SPONGES

Glove Sponge—Hippiospongia canaliculata;
Sheepswool Sponge—Hippiospongia lachne;
Grass Sponge—Spongia graminea; and
Yellow Sponge—Spongia barbera.

Publication in Federal Register.

If the Secretary determines, after consultation with the Secretary of State, that living organisms of any other sedentary species are, at the harvestable stage, either—

(A) immobile on or under the seabed, or

(B) unable to move except in constant physical contact with the seabed or subsoil,

of the Continental Shelf which appertains to the United States, and publishes notice of such determination in the Federal Register, such sedentary species shall be considered to be added to the foregoing list and included in such term for purposes of this Act.

(5) The term "Council" means any Regional Fishery Management Council established under section 302.

(6) The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals, birds, and highly migratory species.

(7) The term "fishery" means—

(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(B) any fishing for such stocks.

(8) The term "fishery conservation zone" means the fishery conservation zone established by section 101.

(9) The term "fishery resource" means any fishery, any stock of fish, any species of fish, and any habitat of fish.

(10) The term "fishing" means—

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity which is conducted by a scientific research vessel.

(11) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for—

(A) fishing; or

(B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

(12) The term "foreign fishing" means fishing by a vessel other than a vessel of the United States.

(13) The term "high seas" means all waters beyond the territorial sea of the United States and beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States.

(14) The term "highly migratory species" means species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean.

(15) The term "international fishery agreement" means any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party.

(16) The term "Marine Fisheries Commission" means the Atlantic States Marine Fisheries Commission, the Gulf States Marine Fisheries Commission, or the Pacific Marine Fisheries Commission.

(17) The term "national standards" means the national standards for fishery conservation and management set forth in section 301.

(18) The term "optimum", with respect to the yield from a fishery, means the amount of fish—

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.

(19) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

(20) The term "Secretary" means the Secretary of Commerce or his designee.

(21) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States.

(22) The term "stock of fish" means a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

(23) The term "treaty" means any international fishery agreement which is a treaty within the meaning of section 2 of article II of the Constitution.

1 USC prec. title 1.

(24) The term "United States", when used in a geographical context, means all the States thereof.

(25) The term "vessel of the United States" means any vessel documented under the laws of the United States or registered under the laws of any State.

TITLE I—FISHERY MANAGEMENT AUTHORITY OF THE UNITED STATES

16 USC 1811. **SEC. 101. FISHERY CONSERVATION ZONE.**

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 USC 1812. **SEC. 102. EXCLUSIVE FISHERY MANAGEMENT AUTHORITY**

The United States shall exercise exclusive fishery management authority, in the manner provided for in this Act, over the following:

(1) All fish within the fishery conservation zone.

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.

(3) All Continental Shelf fishery resources beyond the fishery conservation zone.

16 USC 1813. **SEC. 103. HIGHLY MIGRATORY SPECIES.**

The exclusive fishery management authority of the United States shall not include, nor shall it be construed to extend to, highly migratory species of fish.

16 USC 1811 note. **SEC. 104. EFFECTIVE DATE.**

This title shall take effect March 1, 1977.

TITLE II—FOREIGN FISHING AND INTERNATIONAL FISHERY AGREEMENTS

SEC. 201. FOREIGN FISHING. 16 USC 1821.

(a) IN GENERAL.—After February 28, 1977, no foreign fishing is authorized within the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond the fishery conservation zone, unless such foreign fishing—

(1) is authorized under subsection (b) or (c);

(2) is not prohibited by subsection (f); and

(3) is conducted under, and in accordance with, a valid and applicable permit issued pursuant to section 204.

(b) EXISTING INTERNATIONAL FISHERY AGREEMENTS.—Foreign fishing described in subsection (a) may be conducted pursuant to an international fishery agreement (subject to the provisions of section 202(b) or (c)), if such agreement—

(1) was in effect on the date of enactment of this Act; and

(2) has not expired, been renegotiated, or otherwise ceased to be of force and effect with respect to the United States.

(c) GOVERNING INTERNATIONAL FISHERY AGREEMENTS.—Foreign fishing described in subsection (a) may be conducted pursuant to an international fishery agreement (other than a treaty) which meets the requirements of this subsection if such agreement becomes effective after application of section 203. Any such international fishery agreement shall hereafter in this Act be referred to as a "governing international fishery agreement". Each governing international fishery agreement shall acknowledge the exclusive fishery management authority of the United States, as set forth in this Act. It is the sense of the Congress that each such agreement shall include a binding commitment, on the part of such foreign nation and its fishing vessels, to comply with the following terms and conditions: Terms and conditions.

(1) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such agreement, will abide by all regulations promulgated by the Secretary pursuant to this Act, including any regulations promulgated to implement any applicable fishery management plan or any preliminary fishery management plan.

(2) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such agreement, will abide by the requirement that—

(A) any officer authorized to enforce the provisions of this Act (as provided for in section 311) be permitted— Post, p. 358.

(i) to board, and search or inspect, any such vessel at any time,

(ii) to make arrests and seizures provided for in section 311(b) whenever such officer has reasonable cause to believe, as a result of such a search or inspection, that any such vessel or any person has committed an act prohibited by section 307, and Post, p. 355.

(iii) to examine and make notations on the permit issued pursuant to section 204 for such vessel;

(B) the permit issued for any such vessel pursuant to section 204 be prominently displayed in the wheelhouse of such vessel;

(C) transponders, or such other appropriate position-fixing and identification equipment as the Secretary of the department in which the Coast Guard is operating determines

to be appropriate, be installed and maintained in working order on each such vessel;

(D) duly authorized United States observers be permitted on board any such vessel and that the United States be reimbursed for the cost of such observers;

(E) any fees required under section 204(b)(10) be paid in advance;

(F) agents be appointed and maintained within the United States who are authorized to receive and respond to any legal process issued in the United States with respect to such owner or operator; and

(G) responsibility be assumed, in accordance with any requirements prescribed by the Secretary, for the reimbursement of United States citizens for any loss of, or damage to, their fishing vessels, fishing gear, or catch which is caused by any fishing vessel of that nation;

and will abide by any other monitoring, compliance, or enforcement requirement related to fishery conservation and management which is included in such agreement.

(3) The foreign nation and the owners or operators of all of the fishing vessels of such nation shall not, in any year, exceed such nation's allocation of the total allowable level of foreign fishing, as determined under subsection (e).

(4) The foreign nation will—

(A) apply, pursuant to section 204, for any required permits;

(B) deliver promptly to the owner or operator of the appropriate fishing vessel any permit which is issued under that section for such vessel; and

(C) abide by, and take appropriate steps under its own laws to assure that all such owners and operators comply with, section 204(a) and the applicable conditions and restrictions established under section 204(b)(7).

(d) TOTAL ALLOWABLE LEVEL OF FOREIGN FISHING.—The total allowable level of foreign fishing, if any, with respect to any fishery subject to the exclusive fishery management authority of the United States, shall be that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States, as determined in accordance with the provisions of this Act.

(e) ALLOCATION OF ALLOWABLE LEVEL.—The Secretary of State, in cooperation with the Secretary, shall determine the allocation among foreign nations of the total allowable level of foreign fishing which is permitted with respect to any fishery subject to the exclusive fishery management authority of the United States. In making any such determination, the Secretary of State and the Secretary shall consider—

(1) whether, and to what extent, the fishing vessels of such nations have traditionally engaged in fishing in such fishery;

(2) whether such nations have cooperated with the United States in, and made substantial contributions to, fishery research and the identification of fishery resources;

(3) whether such nations have cooperated with the United States in enforcement and with respect to the conservation and management of fishery resources; and

(4) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.

(f) RECIPROCITY.—Foreign fishing shall not be authorized for the fishing vessels of any foreign nation unless such nation satisfies the

Secretary and the Secretary of State that such nation extends substantially the same fishing privileges to fishing vessels of the United States, if any, as the United States extends to foreign fishing vessels.

(g) PRELIMINARY FISHERY MANAGEMENT PLANS.—The Secretary, when notified by the Secretary of State that any foreign nation has submitted an application under section 204(b), shall prepare a preliminary fishery management plan for any fishery covered by such application if the Secretary determines that no fishery management plan for that fishery will be prepared and implemented, pursuant to title III, before March 1, 1977. To the extent practicable, each such plan— Post, p. 346.

(1) shall contain a preliminary description of the fishery and a preliminary determination as to the optimum yield from such fishery and the total allowable level of foreign fishing with respect to such fishery;

(2) shall require each foreign fishing vessel engaged or wishing to engage in such fishery to obtain a permit from the Secretary;

(3) shall require the submission of pertinent data to the Secretary, with respect to such fishery, as described in section 303(a)(5); and

(4) may, to the extent necessary to prevent irreversible effects from overfishing, with respect to such fishery, contain conservation and management measures applicable to foreign fishing which—

(A) are determined to be necessary and appropriate for the conservation and management of such fishery,

(B) are consistent with the national standards, the other provisions of this Act, and other applicable law, and

(C) are described in section 303(b)(2), (3), (4), (5), and (7).

Each preliminary fishery management plan shall be in effect with respect to foreign fishing for which permits have been issued until a fishery management plan is prepared and implemented, pursuant to title III, with respect to such fishery. The Secretary may, in accordance with section 553 of title 5, United States Code, also prepare and promulgate interim regulations with respect to any such preliminary plan. Such regulations shall be in effect until regulations implementing the applicable fishery management plan are promulgated pursuant to section 305. Regulations.

SEC. 202. INTERNATIONAL FISHERY AGREEMENTS. 16 USC 1822.

(a) NEGOTIATIONS.—The Secretary of State—

(1) shall renegotiate treaties as provided for in subsection (b);

(2) shall negotiate governing international fishery agreements described in section 201(c);

(3) may negotiate boundary agreements as provided for in subsection (d);

(4) shall, upon the request of and in cooperation with the Secretary, initiate and conduct negotiations for the purpose of entering into international fishery agreements—

(A) which allow fishing vessels of the United States equitable access to fish over which foreign nations assert exclusive fishery management authority, and

(B) which provide for the conservation and management of anadromous species and highly migratory species; and

(5) may enter into such other negotiations, not prohibited by subsection (c), as may be necessary and appropriate to further the purposes, policy, and provisions of this Act.

(b) TREATY RENEGOTIATION.—The Secretary of State, in cooperation with the Secretary, shall initiate, promptly after the date of enactment of this Act, the renegotiation of any treaty which pertains to fishing within the fishery conservation zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area, and which is in any manner inconsistent with the purposes, policy, or provisions of this Act, in order to conform such treaty to such purposes, policy, and provisions. It is the sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after such date of enactment.

(c) INTERNATIONAL FISHERY AGREEMENTS.—No international fishery agreement (other than a treaty) which pertains to foreign fishing within the fishery conservation zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area—

(1) which is in effect on June 1, 1976, may thereafter be renewed, extended, or amended; or

(2) may be entered into after May 31, 1976;

by the United States unless it is in accordance with the provisions of section 201(c).

(d) BOUNDARY NEGOTIATIONS.—The Secretary of State, in cooperation with the Secretary, may initiate and conduct negotiations with any adjacent or opposite foreign nation to establish the boundaries of the fishery conservation zone of the United States in relation to any such nation.

(e) NONRECOGNITION.—It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation—

(1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States;

(2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement; or

(3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.

16 USC 1823.

SEC. 203. CONGRESSIONAL OVERSIGHT OF GOVERNING INTERNATIONAL FISHERY AGREEMENTS.

Transmittal to Congress.

(a) IN GENERAL.—No governing international fishery agreement shall become effective with respect to the United States before the close of the first 60 calendar days of continuous session of the Congress after the date on which the President transmits to the House of Representatives and to the Senate a document setting forth the text of such governing international fishery agreement. A copy of the document shall be delivered to each House of Congress on the same day and shall be delivered to the Clerk of the House of Representatives, if the House is not in session, and to the Secretary of the Senate, if the Senate is not in session.

(b) REFERRAL TO COMMITTEES.—Any document described in subsection (a) shall be immediately referred in the House of Representatives to the Committee on Merchant Marine and Fisheries, and in the Senate to the Committees on Commerce and Foreign Relations.

(c) COMPUTATION OF 60-DAY PERIOD.—For purposes of subsection (a)—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(d) CONGRESSIONAL PROCEDURES.—

(1) RULES OF THE HOUSE OF REPRESENTATIVES AND SENATE.—The provisions of this section are enacted by the Congress—

(A) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of fishery agreement resolutions described in paragraph (2), and they supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as they relate to the procedure of that House) at any time, and in the same manner and to the same extent as in the case of any other rule of that House.

(2) DEFINITION.—For purposes of this subsection, the term "fishery agreement resolution" refers to a joint resolution of either House of Congress—

(A) the effect of which is to prohibit the entering into force and effect of any governing international fishery agreement the text of which is transmitted to the Congress pursuant to subsection (a); and

(B) which is reported from the Committee on Merchant Marine and Fisheries of the House of Representatives or the Committee on Commerce or the Committee on Foreign Relations of the Senate, not later than 45 days after the date on which the document described in subsection (a) relating to that agreement is transmitted to the Congress.

(3) PLACEMENT ON CALENDAR.—Any fishery agreement resolution upon being reported shall immediately be placed on the appropriate calendar.

(4) FLOOR CONSIDERATION IN THE HOUSE.—

(A) A motion in the House of Representatives to proceed to the consideration of any fishery agreement resolution shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(B) Debate in the House of Representatives on any fishery agreement resolution shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. It shall not be in order to move to recommit any fishery agreement resolution or to move to reconsider the vote by which any fishery agreement resolution is agreed to or disagreed to.

Debate limitation.

(C) Motions to postpone, made in the House of Representatives with respect to the consideration of any fishery agreement resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(D) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any fishery agreement resolution shall be decided without debate.

(E) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any fishery agreement resolution shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions in similar circumstances.

(5) FLOOR CONSIDERATION IN THE SENATE.—

(A) A motion in the Senate to proceed to the consideration of any fishery agreement resolution shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(B) Debate in the Senate on any fishery agreement resolution and on all debatable motions and appeals in connection therewith shall be limited to not more than 10 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(C) Debate in the Senate on any debatable motion or appeal in connection with any fishery agreement resolution shall be limited to not more than 1 hour, to be equally divided between, and controlled by, the mover of the motion or appeal and the manager of the resolution, except that if the manager of the resolution is in favor of any such motion or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee. The majority leader and the minority leader, or either of them, may allot additional time to any Senator during the consideration of any debatable motion or appeal, from time under their control with respect to the applicable fishery agreement resolution.

(D) A motion in the Senate to further limit debate is not debatable. A motion to recommit any fishery agreement resolution is not in order.

Debate limitation.

16 USC 1824.

SEC. 204. PERMITS FOR FOREIGN FISHING.

(a) IN GENERAL.—After February 28, 1977, no foreign fishing vessel shall engage in fishing within the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone, unless such vessel has on board a valid permit issued under this section for such vessel.

(b) APPLICATIONS AND PERMITS UNDER GOVERNING INTERNATIONAL FISHERY AGREEMENTS.—

(1) ELIGIBILITY.—Each foreign nation with which the United States has entered into a governing international fishery agreement shall submit an application to the Secretary of State each year for a permit for each of its fishing vessels that wishes to engage in fishing described in subsection (a).

(2) FORMS.—The Secretary, in consultation with the Secretary of State and the Secretary of the department in which the Coast Guard is operating, shall prescribe the forms for permit applications submitted under this subsection and for permits issued pursuant to any such application.

(3) CONTENTS.—Any application made under this subsection shall specify—

(A) the name and official number or other identification of each fishing vessel for which a permit is sought, together with the name and address of the owner thereof;

(B) the tonnage, capacity, speed, processing equipment, type and quantity of fishing gear, and such other pertinent information with respect to characteristics of each such vessel as the Secretary may require;

(C) each fishery in which each such vessel wishes to fish;

(D) the amount of fish or tonnage of catch contemplated for each such vessel during the time such permit is in force; and

(E) the ocean area in which, and the season or period during which, such fishing will be conducted;

and shall include any other pertinent information and material which the Secretary may require.

Publication in Federal Register.

(4) TRANSMITTAL FOR ACTION.—Upon receipt of any application which complies with the requirements of paragraph (3), the Secretary of State shall publish such application in the Federal Register and shall promptly transmit—

(A) such application, together with his comments and recommendations thereon, to the Secretary;

(B) a copy of the application to each appropriate Council and to the Secretary of the department in which the Coast Guard is operating; and

Transmittal to congressional committees.

(C) a copy of such material to the Committee on Merchant Marine and Fisheries of the House of Representatives and to the Committees on Commerce and Foreign Relations of the Senate.

Written comments.

(5) ACTION BY COUNCIL.—After receipt of an application transmitted under paragraph (4)(B), each appropriate Council shall prepare and submit to the Secretary such written comments on the application as it deems appropriate. Such comments shall be submitted within 45 days after the date on which the application is received by the Council and may include recommendations with respect to approval of the application and, if approval is recommended, with respect to appropriate conditions and restrictions thereon. Any interested person may submit comments to such Council with respect to any such application. The Council shall consider any such comments in formulating its submission to the Secretary.

(6) APPROVAL.—After receipt of any application transmitted under paragraph (4)(A), the Secretary shall consult with the Secretary of State and, with respect to enforcement, with the Secretary of the department in which the Coast Guard is operating. The Secretary, after taking into consideration the views and recommendations of such Secretaries, and any comments submitted by any Council under paragraph (5), may approve the application, if he determines that the fishing described in the application will meet the requirements of this Act.

(7) ESTABLISHMENT OF CONDITIONS AND RESTRICTIONS.—The Secretary shall establish conditions and restrictions which shall be included in each permit issued pursuant to any application approved under paragraph (6) and which must be complied with by the owner or operator of the fishing vessel for which the permit is issued. Such conditions and restrictions shall include the following:

(A) All of the requirements of any applicable fishery management plan, or preliminary fishery management plan, and the regulations promulgated to implement any such plan.

(B) The requirement that no permit may be used by any vessel other than the fishing vessel for which it is issued.

(C) The requirements described in section 201(c) (1), (2), and (3).

(D) Any other condition and restriction related to fishery conservation and management which the Secretary prescribes as necessary and appropriate.

(8) NOTICE OF APPROVAL.—The Secretary shall promptly transmit a copy of each application approved under paragraph (6) and the conditions and restrictions established under paragraph (7) to—

(A) the Secretary of State for transmittal to the foreign nation involved;

(B) the Secretary of the department in which the Coast Guard is operating;

(C) any Council which has authority over any fishery specified in such application; and

Transmittal to congressional committees.

(D) the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committees on Commerce and Foreign Relations of the Senate.

(9) DISAPPROVAL OF APPLICATIONS.—If the Secretary does not approve any application submitted by a foreign nation under this subsection, he shall promptly inform the Secretary of State of the disapproval and his reasons therefore. The Secretary of State shall notify such foreign nation of the disapproval and the reasons therefor. Such foreign nation, after taking into consideration the reasons for disapproval, may submit a revised application under this subsection.

(10) FEES.—Reasonable fees shall be paid to the Secretary by the owner or operator of any foreign fishing vessel for which a permit is issued pursuant to this subsection. The Secretary, in consultation with the Secretary of State, shall establish and publish a schedule of such fees, which shall apply nondiscriminatorily to each foreign nation. In determining the level of such fees, the Secretary may take into account the cost of carrying out the provisions of this Act with respect to foreign fishing, including, but not limited to, the cost of fishery conservation and management, fisheries research, administration, and enforcement.

(11) ISSUANCE OF PERMITS.—If a foreign nation notifies the Secretary of State of its acceptance of the conditions and restrictions established by the Secretary under paragraph (7), the Secretary of State shall promptly transmit such notification to the Secretary. Upon payment of the applicable fees established pursuant to paragraph (10), the Secretary shall thereupon issue to such foreign nation, through the Secretary of State, permits for the appropriate fishing vessels of that nation. Each permit shall contain a statement of all conditions and restrictions established under paragraph (7) which apply to the fishing vessel for which the permit is issued.

(12) SANCTIONS.—If any foreign fishing vessel for which a permit has been issued pursuant to this subsection has been used in the commission of any act prohibited by section 307 the Secretary may, or if any civil penalty imposed under section 308 or any criminal fine imposed under section 309 has not been paid and is overdue the Secretary shall—

(A) revoke such permit, with or without prejudice to the right of the foreign nation involved to obtain a permit for such vessel in any subsequent year;

(B) suspend such permit for the period of time deemed appropriate; or

(C) impose additional conditions and restrictions on the approved application of the foreign nation involved and on any permit issued under such application.

Any permit which is suspended under this paragraph for nonpayment of a civil penalty shall be reinstated by the Secretary upon the payment of such civil penalty together with interest thereon at the prevailing rate.

(c) REGISTRATION PERMITS.—The Secretary of State, in cooperation with the Secretary, shall issue annually a registration permit for each fishing vessel of a foreign nation which is a party to an international fishery agreement under which foreign fishing is authorized by section 201(b) and which wishes to engage in fishing described in subsection (a). Each such permit shall set forth the terms and conditions contained in the agreement that apply with respect to such fishing, and shall include the additional requirement that the owner or operator of the fishing vessel for which the permit is issued shall prominently display such permit in the wheelhouse of such vessel and show it, upon request, to any officer authorized to enforce the provisions of this Act (as provided for in section 311). The Secretary of State, after consultation with the Secretary and the Secretary of the department in which the Coast Guard is operating, shall prescribe the form and manner in which applications for registration permits may be made, and the forms of such permits. The Secretary of State may establish, require the payment of, and collect fees for registration permits; except that the level of such fees shall not exceed the administrative costs incurred by him in issuing such permits.

SEC. 205. IMPORT PROHIBITIONS. 16 USC 1825.

(a) DETERMINATIONS BY SECRETARY OF STATE.—If the Secretary of State determines that—

(1) he has been unable, within a reasonable period of time, to conclude with any foreign nation an international fishery agreement allowing fishing vessels of the United States equitable access to fisheries over which that nation asserts exclusive fishery management authority, as recognized by the United States, in accordance with traditional fishing activities of such vessels, if any, and under terms not more restrictive than those established under sections 201 (c) and (d) and 204 (b) (7) and (10), because such nation has (A) refused to commence negotiations, or (B) failed to negotiate in good faith;

(2) any foreign nation is not allowing fishing vessels of the United States to engage in fishing for highly migratory species in accordance with an applicable international fishery agreement, whether or not such nation is a party thereto;

(3) any foreign nation is not complying with its obligations under any existing international fishery agreement concerning fishing by fishing vessels of the United States in any fishery over which that nation asserts exclusive fishery management authority; or

(4) any fishing vessel of the United States, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States, is seized by any foreign nation—

(A) in violation of an applicable international fishery agreement;

(B) without authorization under an agreement between the United States and such nation; or

(C) as a consequence of a claim of jurisdiction which is not recognized by the United States;

he shall certify such determination to the Secretary of the Treasury.

(b) PROHIBITIONS.—Upon receipt of any certification from the Secretary of State under subsection (a), the Secretary of the Treasury shall immediately take such action as may be necessary and appropriate to prohibit the importation into the United States—

(1) of all fish and fish products from the fishery involved, if any; and

(2) upon recommendation of the Secretary of State, such other fish or fish products, from any fishery of the foreign nation concerned, which the Secretary of State finds to be appropriate to carry out the purposes of this section.

(c) REMOVAL OF PROHIBITION.—If the Secretary of State finds that the reasons for the imposition of any import prohibition under this section no longer prevail, the Secretary of State shall notify the Secretary of the Treasury, who shall promptly remove such import prohibition.

(d) DEFINITIONS.—As used in this section—

(1) The term "fish" includes any highly migratory species.

(2) The term "fish products" means any article which is produced from or composed of (in whole or in part) any fish.

TITLE III—NATIONAL FISHERY MANAGEMENT PROGRAM

16 USC 1851. **SEC. 301. NATIONAL STANDARDS FOR FISHERY CONSERVATION AND MANAGEMENT.**

(a) IN GENERAL.—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) GUIDELINES.—The Secretary shall establish guidelines, based on the national standards, to assist in the development of fishery management plans.

SEC. 302. REGIONAL FISHERY MANAGEMENT COUNCILS.

16 USC 1852. Establishment.

(a) ESTABLISHMENT.—There shall be established, within 120 days after the date of the enactment of this Act, eight Regional Fishery Management Councils, as follows:

(1) NEW ENGLAND COUNCIL.—The New England Fishery Management Council shall consist of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The New England Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) (at least one of whom shall be appointed from each such State).

(2) MID-ATLANTIC COUNCIL.—The Mid-Atlantic Fishery Management Council shall consist of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The Mid-Atlantic Council shall have 19 voting members, including 12 appointed by the Secretary pursuant to subsection (b)(1)(C) (at least one of whom shall be appointed from each such State).

(3) SOUTH ATLANTIC COUNCIL.—The South Atlantic Fishery Management Council shall consist of the States of North Carolina, South Carolina, Georgia, and Florida and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The South Atlantic Council shall have 13 voting members, including 8 appointed by the Secretary pursuant to subsection (b)(1)(C) (at least one of whom shall be appointed from each such State).

(4) CARIBBEAN COUNCIL.—The Caribbean Fishery Management Council shall consist of the Virgin Islands and the Commonwealth of Puerto Rico and shall have authority over the fisheries in the Caribbean Sea and Atlantic Ocean seaward of such States. The Caribbean Council shall have 7 voting members, including 4 appointed by the Secretary pursuant to subsection (b)(1)(C) (at least one of whom shall be appointed from each such State).

(5) GULF COUNCIL.—The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States. The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) (at least one of whom shall be appointed from each such State).

(6) PACIFIC COUNCIL.—The Pacific Fishery Management Council shall consist of the States of California, Oregon, Washington, and Idaho and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Council shall have 13 voting members, including 8 appointed by the

Secretary pursuant to subsection (b)(1)(C) (at least one of whom shall be appointed from each such State).

(7) NORTH PACIFIC COUNCIL.—The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The North Pacific Council shall have 11 voting members, including 7 appointed by the Secretary pursuant to subsection (b)(1)(C) (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington).

(8) WESTERN PACIFIC COUNCIL.—The Western Pacific Fishery Management Council shall consist of the State of Hawaii, American Samoa, and Guam and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Western Pacific Council shall have 11 voting members, including 7 appointed by the Secretary pursuant to subsection (b)(1)(C) (at least one of whom shall be appointed from each such State).

Each Council shall reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority.

(b) VOTING MEMBERS.—(1) The voting members of each Council shall be:

(A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the Secretary shall be appointed by the Secretary from a list of qualified individuals submitted by the Governor of each applicable constituent State. With respect to the initial such appointments, such Governors shall submit such lists to the Secretary as soon as practicable, not later than 45 days after the date of the enactment of this Act. As used in this subparagraph, (i) the term "list of qualified individuals" shall include the names (including pertinent biographical data) of not less than three such individuals for each applicable vacancy, and (ii) the term "qualified individual" means an individual who is knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishery resources of the geographical area concerned.

"List of qualified individuals."

"Qualified individual."

Term.

(2) Each voting member appointed to a Council pursuant to paragraph (1)(C) shall serve for a term of 3 years; except that, with respect to the members initially so appointed, the Secretary shall designate up to one-third thereof to serve for a term of 1 year, up to one-third thereof to serve for a term of 2 years, and the remaining such members to serve for a term of 3 years.

(3) Successors to the voting members of any Council shall be appointed in the same manner as the original voting members. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(c) NONVOTING MEMBERS.—(1) The nonvoting members of each Council shall be:

(A) The regional or area director of the United States Fish and Wildlife Service for the geographical area concerned, or his designee.

(B) The commander of the Coast Guard district for the geographical area concerned, or his designee; except that, if two Coast Guard districts are within such geographical area, the commander designated for such purpose by the commandant of the Coast Guard.

(C) The executive director of the Marine Fisheries Commission for the geographical area concerned, if any, or his designee.

(D) One representative of the Department of State designated for such purpose by the Secretary of State, or his designee.

(2) The Pacific Council shall have one additional nonvoting member who shall be appointed by, and serve at the pleasure of, the Governor of Alaska.

(d) COMPENSATION AND EXPENSES.—The voting members of each Council, who are not employed by the Federal Government or any State or local government, shall receive compensation at the daily rate for GS-18 of the General Schedule when engaged in the actual performance of duties for such Council. The voting members of each Council, any nonvoting member described in subsection (c)(1)(C), and the nonvoting member appointed pursuant to subsection (c)(2) shall be reimbursed for actual expenses incurred in the performance of such duties.

5 USC 5332 note.

(e) TRANSACTION OF BUSINESS.—

(1) A majority of the voting members of any Council shall constitute a quorum, but one or more such members designated by the Council may hold hearings. All decisions of any Council shall be by majority vote of the voting members present and voting.

(2) The voting members of each Council shall select a Chairman for such Council from among the voting members.

(3) Each Council shall meet in the geographical area concerned at the call of the Chairman or upon the request of a majority of its voting members.

(4) If any voting member of a Council disagrees with respect to any matter which is transmitted to the Secretary by such Council, such member may submit a statement to the Secretary setting forth the reasons for such disagreement.

(f) STAFF AND ADMINISTRATION.—

(1) Each Council may appoint, and assign duties to, an executive director and such other full- and part-time administrative employees as the Secretary determines are necessary to the performance of its functions.

(2) Upon the request of any Council, and after consultation with the Secretary, the head of any Federal agency is authorized to detail to such Council, on a reimbursable basis, any of the personnel of such agency, to assist such Council in the performance of its functions under this Act.

(3) The Secretary shall provide to each Council such administrative and technical support services as are necessary for the effective functioning of such Council.

(4) The Administrator of General Services shall furnish each Council with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

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(5) The Secretary and the Secretary of State shall furnish each Council with relevant information concerning foreign fishing and international fishery agreements.

(6) Each Council shall determine its organization, and prescribe its practices and procedures for carrying out its functions under this Act, in accordance with such uniform standards as are prescribed by the Secretary. Each Council shall publish and make available to the public a statement of its organization, practices, and procedures.

(7) The Secretary shall pay—

(A) the compensation and expenses provided for in subsection (d);

(B) appropriate compensation to employees appointed under paragraph (1);

(C) the amounts required for reimbursement of other Federal agencies under paragraphs (2) and (4);

(D) the actual expenses of the members of the committees and panels established under subsection (g); and

(E) such other costs as the Secretary determines are necessary to the performance of the functions of the Councils.

(g) COMMITTEES AND PANELS.—

(1) Each Council shall establish and maintain, and appoint the members of, a scientific and statistical committee to assist it in the development, collection, and evaluation of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.

(2) Each Council shall establish such other advisory panels as are necessary or appropriate to assist it in carrying out its functions under this Act.

(h) FUNCTIONS.—Each Council shall, in accordance with the provisions of this Act—

Fishery management plan.

(1) prepare and submit to the Secretary a fishery management plan with respect to each fishery within its geographical area of authority and, from time to time, such amendments to each such plan as are necessary;

Comments.

(2) prepare comments on any application for foreign fishing transmitted to it under section 204(b)(4)(B), and any fishery management plan or amendment transmitted to it under section 304(c)(2);

Public hearings.

(3) conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this Act;

Reports.

(4) submit to the Secretary—

(A) a report, before February 1 of each year, on the Council's activities during the immediately preceding calendar year,

(B) such periodic reports as the Council deems appropriate, and

(C) any other relevant report which may be requested by the Secretary;

Review.

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 303(a)(3) and (4) with respect to the optimum yield from, and the total allowable level of foreign fishing in, each fishery within its geographical area of authority; and

(6) conduct any other activities which are required by, or provided for in, this Act or which are necessary and appropriate to the foregoing functions.

SEC. 303. CONTENTS OF FISHERY MANAGEMENT PLANS. 16 USC 1853.

(a) REQUIRED PROVISIONS.—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) necessary and appropriate for the conservation and management of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this Act, and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3), and

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing; and

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, and number of hauls.

(b) DISCRETIONARY PROVISIONS.—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

(1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this Act;

(5) incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery;

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations; and

(7) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

(c) PROPOSED REGULATIONS.—Any Council may prepare any proposed regulations which it deems necessary and appropriate to carry out any fishery management plan, or any amendment to any fishery management plan, which is prepared by it. Such proposed regulations shall be submitted to the Secretary, together with such plan or amendment, for action by the Secretary pursuant to sections 304 and 305.

(d) CONFIDENTIALITY OF STATISTICS.—Any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) shall be confidential and shall not be disclosed except when required under court order. The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary may release or make public any such statistics in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such statistics.

16 USC 1854. **SEC. 304. ACTION BY THE SECRETARY.**

(a) ACTION BY THE SECRETARY AFTER RECEIPT OF PLAN.—Within 60 days after the Secretary receives any fishery management plan, or any amendment to any such plan, which is prepared by any Council, the Secretary shall—

(1) review such plan or amendment pursuant to subsection (b); and

(2) notify such Council in writing of his approval, disapproval, or partial disapproval of such plan or amendment.

In the case of disapproval or partial disapproval, the Secretary shall include in such notification a statement and explanation of the Secretary's objections and the reasons therefor, suggestions for improvement, a request to such Council to change such plan or amendment to satisfy the objections, and a request to resubmit the plan or amendment, as so modified, to the Secretary within 45 days after the date on which the Council receives such notification.

(b) REVIEW BY THE SECRETARY.—The Secretary shall review any fishery management plan, and any amendment to any such plan, prepared by any Council and submitted to him to determine whether

it is consistent with the national standards, the other provisions of this Act, and any other applicable law. In carrying out such review, the Secretary shall consult with—

(1) the Secretary of State with respect to foreign fishing; and

(2) the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(c) PREPARATION BY THE SECRETARY.—(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this Act, and any other applicable law, if—

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management; or

(B) the Secretary disapproves or partially disapproves any such plan or amendment, and the Council involved fails to change such plan or amendment in accordance with the notification made under subsection (a)(2).

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(2) Whenever, pursuant to paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall promptly transmit such plan or amendment to the appropriate Council for consideration and comment. Within 45 days after the date of receipt of such plan or amendment, the appropriate Council may recommend, to the Secretary, changes in such plan or amendment, consistent with the national standards, the other provisions of this Act, and any other applicable law. After the expiration of such 45-day period, the Secretary may implement such plan or amendment pursuant to section 305.

(3) Notwithstanding paragraph (1), the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system described in section 303(b)(6), unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

(d) ESTABLISHMENT OF FEES.—The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1). Such level shall not exceed the administrative costs incurred by the Secretary in issuing such permits. Regulations.

(e) FISHERIES RESEARCH.—The Secretary shall initiate and maintain a comprehensive program of fishery research to carry out and further the purposes, policy, and provisions of this Act. Such program shall be designed to acquire knowledge and information, including statistics, on fishery conservation and management, including, but not limited to, biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution on fish, the impact of wetland and estuarine degradation, and other matters bearing upon the abundance and availability of fish.

(f) MISCELLANEOUS DUTIES.—(1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary may—

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

16 USC 1855.

SEC. 305. IMPLEMENTATION OF FISHERY MANAGEMENT PLANS.

Publication in Federal Register.

(a) IN GENERAL.—As soon as practicable after the Secretary—

(1) approves, pursuant to section 304 (a) and (b), any fishery management plan or amendment; or

(2) prepares, pursuant to section 304(c), any fishery management plan or amendment;

the Secretary shall publish in the Federal Register (A) such plan or amendment, and (B) any regulations which he proposes to promulgate to implement such plan or amendment. Interested persons shall be afforded a period of not less than 45 days after such publication within which to submit in writing data, views, or comments on the plan or amendment, and on the proposed regulations. Written comments.

(b) HEARING.—The Secretary may schedule a hearing, in accordance with section 553 of title 5, United States Code, on any fishery management plan, any amendment to any such plan, and any regulations to implement any such plan or amendment. If any such hearing is scheduled, the Secretary may, pending its outcome—

(A) postpone the effective date of the regulations proposed to implement such plan or amendment; or

(B) take such other action as he deems appropriate to preserve the rights or status of any person.

Regulations.

(c) IMPLEMENTATION.—The Secretary shall promulgate regulations to implement any fishery management plan or any amendment to any such plan—

(1) after consideration of all relevant matters—

(A) presented to him during the 45-day period referred to in subsection (a), and

(B) produced in any hearing held under subsection (b); and

(2) if he finds that the plan or amendment is consistent with the national standards, the other provisions of this Act, and any other applicable law.

To the extent practicable, such regulations shall be put into effect in a manner which does not disrupt the regular fishing season for any fishery.

(d) JUDICIAL REVIEW.—Regulations promulgated by the Secretary under this Act shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, United States Code, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulation on a ground specified in section 706(2) (A), (B), (C), or (D) of such title. 5 USC 701 et seq.

Emergency regulations.

(e) EMERGENCY ACTIONS.—If the Secretary finds that an emergency involving any fishery resources exists, he may—

(1) promulgate emergency regulations, without regard to subsections (a) and (c), to implement any fishery management plan, if such emergency so requires; or

(2) promulgate emergency regulations to amend any regulation which implements any existing fishery management plan, to the extent required by such emergency.

Any emergency regulation which changes any existing fishery management plan shall be treated as an amendment to such plan for the period in which such regulation is in effect. Any emergency regulation promulgated under this subsection (A) shall be published in the Federal Register together with the reasons therefor; (B) shall remain in effect for not more than 45 days after the date of such publication, except that any such regulation may be repromulgated for one additional period of not more than 45 days; and (C) may be terminated by the Secretary at any earlier date by publication in the Federal Register of a notice of termination.

Publication in Federal Register.

Publication in Federal Register.

(f) ANNUAL REPORT.—The Secretary shall report to the Congress and the President, not later than March 1 of each year, on all activities of the Councils and the Secretary with respect to fishery management plans, regulations to implement such plans, and all other activities relating to the conservation and management of fishery resources that were undertaken under this Act during the preceding calendar year.

Report to Congress and President.

(g) RESPONSIBILITY OF THE SECRETARY.—The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act. The Secretary may promulgate such regulations, in accordance with section 553 of title 5, United States Code, as may be necessary to discharge such responsibility or to carry out any other provision of this Act.

Regulations.

SEC. 306. STATE JURISDICTION.

16 USC 1856.

(a) IN GENERAL.—Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) EXCEPTION.—(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that—

Notice, hearing.

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

SEC. 307. PROHIBITED ACTS.

16 USC 1857.

It is unlawful—

(1) for any person—

(A) to violate any provision of this Act or any regulation or permit issued pursuant to this Act;

(B) to use any fishing vessel to engage in fishing after the revocation, or during the period of suspension, of an applicable permit issued pursuant to this Act;

(C) to violate any provision of, or regulation under, an applicable governing international fishery agreement entered into pursuant to section 201(c);

(D) to refuse to permit any officer authorized to enforce the provisions of this Act (as provided for in section 311) to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this Act or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

(E) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in subparagraph (D);

(F) to resist a lawful arrest for any act prohibited by this section;

(G) to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this Act or any regulation, permit, or agreement referred to in subparagraph (A) or (C); or

(H) to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section; and

(2) for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage in fishing—

(A) within the boundaries of any State; or

(B) within the fishery conservation zone, or for any anadromous species or Continental Shelf fishery resources beyond such zone, unless such fishing is authorized by, and conducted in accordance with, a valid and applicable permit issued pursuant to section 204(b) or (c).

16 USC 1858.

SEC. 308. CIVIL PENALTIES.

(a) ASSESSMENT OF PENALTY.—Any person who is found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, to have committed an act prohibited by section 307 shall be liable to the United States for a civil penalty. The amount of the civil penalty shall not exceed $25,000 for each violation. Each day of a continuing violation shall constitute a separate offense. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(b) REVIEW OF CIVIL PENALTY.—Any person against whom a civil penalty is assessed under subsection (a) may obtain review thereof in the appropriate court of the United States by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found

or such penalty imposed, as provided in section 2112 of title 28, United States Code. The findings and order of the Secretary shall be set aside by such court if they are not found to be supported by substantial evidence, as provided in section 706(2) of title 5, United States Code.

(c) ACTION UPON FAILURE TO PAY ASSESSMENT.—If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(d) COMPROMISE OR OTHER ACTION BY SECRETARY.—The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section.

SEC. 309. CRIMINAL OFFENSES. 16 USC 1859.

(a) OFFENSES.—A person is guilty of an offense if he commits any act prohibited by—

(1) section 307(1) (D), (E), (F), or (H); or

(2) section 307(2).

(b) PUNISHMENT.—Any offense described in subsection (a)(1) is punishable by a fine of not more than $50,000, or imprisonment for not more than 6 months, or both; except that if in the commission of any such offense the person uses a dangerous weapon, engages in conduct that causes bodily injury to any officer authorized to enforce the provisions of this Act (as provided for in section 311), or places any such officer in fear of imminent bodily injury, the offense is punishable by a fine of not more than $100,000, or imprisonment for not more than 10 years, or both. Any offense described in subsection (a)(2) is punishable by a fine of not more than $100,000, or imprisonment for not more than 1 year, or both.

(c) JURISDICTION.—There is Federal jurisdiction over any offense described in this section.

SEC. 310. CIVIL FORFEITURES. 16 USC 1860.

(a) IN GENERAL.—Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by section 307 (other than any act for which the issuance of a citation under section 311(c) is sufficient sanction) shall be subject to forfeiture to the United States. All or part of such vessel may, and all such fish shall, be forfeited to the United States pursuant to a civil proceeding under this section.

(b) JURISDICTION OF COURTS.—Any district court of the United States which has jurisdiction under section 311(d) shall have jurisdiction, upon application by the Attorney General on behalf of the United States, to order any forfeiture authorized under subsection (a) and any action provided for under subsection (d).

(c) JUDGMENT.—If a judgment is entered for the United States in a civil forfeiture proceeding under this section, the Attorney General may seize any property or other interest declared forfeited to the United States, which has not previously been seized pursuant to this Act or for which security has not previously been obtained under subsection (d). The provisions of the customs laws relating to—

(1) the disposition of forfeited property,

(2) the proceeds from the sale of forfeited property,

(3) the remission or mitigation of forfeitures, and

(4) the compromise of claims,

shall apply to any forfeiture ordered, and to any case in which forfeiture is alleged to be authorized, under this section, unless such provisions are inconsistent with the purposes, policy, and provisions of this Act. The duties and powers imposed upon the Commissioner of Customs or other persons under such provisions shall, with respect to this Act, be performed by officers or other persons designated for such purpose by the Secretary.

(d) PROCEDURE.—(1) Any officer authorized to serve any process in rem which is issued by a court having jurisdiction under section 311(d) shall—

(A) stay the execution of such process; or

(B) discharge any fish seized pursuant to such process;

upon the receipt of a satisfactory bond or other security from any person claiming such property. Such bond or other security shall be conditioned upon such person (i) delivering such property to the appropriate court upon order thereof, without any impairment of its value, or (ii) paying the monetary value of such property pursuant to an order of such court. Judgment shall be recoverable on such bond or other security against both the principal and any sureties in the event that any condition thereof is breached, as determined by such court.

(2) Any fish seized pursuant to this Act may be sold, subject to the approval and direction of the appropriate court, for not less than the fair market value thereof. The proceeds of any such sale shall be deposited with such court pending the disposition of the matter involved.

(e) REBUTTABLE PRESUMPTION.—For purposes of this section, it shall be a rebuttable presumption that all fish found on board a fishing vessel which is seized in connection with an act prohibited by section 307 were taken or retained in violation of this Act.

16 USC 1861. **SEC. 311. ENFORCEMENT.**

(a) RESPONSIBILITY.—The provisions of this Act shall be enforced by the Secretary and the Secretary of the department in which the Coast Guard is operating. Such Secretaries may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency, in the performance of such duties. Such Secretaries shall report semiannually, to each committee of the Congress listed in section 203(b) and to the Councils, on the degree and extent of known and estimated compliance with the provisions of this Act.

Reports to congressional committees.

(b) POWERS OF AUTHORIZED OFFICERS.—Any officer who is authorized (by the Secretary, the Secretary of the department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an agreement with such Secretaries under subsection (a)) to enforce the provisions of this Act may—

(1) with or without a warrant or other process—

(A) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 307;

(B) board, and search or inspect, any fishing vessel which is subject to the provisions of this Act;

(C) seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed

in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this Act;

(D) seize any fish (wherever found) taken or retained in violation of any provision of this Act; and

(E) seize any other evidence related to any violation of any provision of this Act;

(2) execute any warrant or other process issued by any court of competent jurisdiction; and

(3) exercise any other lawful authority.

(c) ISSUANCE OF CITATIONS.—If any officer authorized to enforce the provisions of this Act (as provided for in this section) finds that a fishing vessel is operating or has been operated in violation of any provision of this Act, such officer may, in accordance with regulations issued jointly by the Secretary and the Secretary of the department in which the Coast Guard is operating, issue a citation to the owner or operator of such vessel in lieu of proceeding under subsection (b). If a permit has been issued pursuant to this Act for such vessel, such officer shall note the issuance of any citation under this subsection, including the date thereof and the reason therefor, on the permit. The Secretary shall maintain a record of all citations issued pursuant to this subsection.

(d) JURISDICTION OF COURTS.—The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this Act. In the case of Guam, and any Commonwealth, territory, or possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam, except that in the case of American Samoa, the appropriate court is the United States District Court for the District of Hawaii. Any such court may, at any time—

(1) enter restraining orders or prohibitions;

(2) issue warrants, process in rem, or other process;

(3) prescribe and accept satisfactory bonds or other security; and

(4) take such other actions as are in the interest of justice.

(e) DEFINITION.—For purposes of this section—

(1) The term "provisions of this Act" includes (A) any regulation or permit issued pursuant to this Act, and (B) any provision of, or regulation issued pursuant to, any international fishery agreement under which foreign fishing is authorized by section 201 (b) or (c), with respect to fishing subject to the exclusive fishery management authority of the United States.

(2) The term "violation of any provision of this Act" includes (A) the commission of any act prohibited by section 307, and (B) the violation of any regulation, permit, or agreement referred to in paragraph (1).

SEC. 312. EFFECTIVE DATE OF CERTAIN PROVISIONS. 16 USC 1857 note.

Sections 307, 308, 309, 310, and 311 shall take effect March 1, 1977.

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. EFFECT ON LAW OF THE SEA TREATY. 16 USC 1881.

If the United States ratifies a comprehensive treaty, which includes provisions with respect to fishery conservation and management jurisdiction, resulting from any United Nations Conference on the Law of the Sea, the Secretary, after consultation with the Secretary of State, may promulgate any amendment to the regulations promulgated under this Act if such amendment is necessary and appropriate to

conform such regulations to the provisions of such treaty, in anticipation of the date when such treaty shall come into force and effect for, or otherwise be applicable to, the United States.

SEC. 402. REPEALS.

(a) The Act of October 14, 1966 (16 U.S.C. 1091–1094), is repealed as of March 1, 1977.

(b) The Act of May 20, 1964 (16 U.S.C. 1081–1086), is repealed as of March 1, 1977.

SEC. 403. FISHERMEN'S PROTECTIVE ACT AMENDMENTS.

(a) AMENDMENTS.—The Act of August 27, 1954 (22 U.S.C. 1972), is amended—

(1) by amending section 2 thereof to read as follows:

"SEC. 2. If—

"(1) any vessel of the United States is seized by a foreign country on the basis of claims in territorial waters or the high seas which are not recognized by the United States; or

"(2) any general claim of any foreign country to exclusive fishery management authority is recognized by the United States, and any vessel of the United States is seized by such foreign country on the basis of conditions and restrictions under such claim, if such conditions and restrictions—

"(A) are unrelated to fishery conservation and management;

"(B) fail to consider and take into account traditional fishing practices of vessels of the United States;

"(C) are greater or more onerous than the conditions and restrictions which the United States applies to foreign fishing vessels subject to the exclusive fishery management authority of the United States (as established in title I of the Fishery Conservation and Management Act of 1976); or

"(D) fail to allow fishing vessels of the United States equitable access to fish subject to such country's exclusive fishery management authority;

and there is no dispute as to the material facts with respect to the location or activity of such vessel at the time of such seizure, the Secretary of State shall immediately take such steps as are necessary—

"(i) for the protection of such vessel and for the health and welfare of its crew;

"(ii) to secure the release of such vessel and its crew; and

"(iii) to determine the amount of any fine, license, fee, registration fee, or other direct charge reimbursable under section 3(a) of this Act."; and

Infra.

22 USC 1973.

(2) by amending section 3(a) thereof by inserting immediately before the last sentence thereof the following new sentence: "For purposes of this section, the term 'other direct charge' means any levy, however characterized or computed (including, but not limited to, any computation based on the value of a vessel or the value of fish or other property on board a vessel), which is imposed in addition to any fine, license fee, or registration fee."

22 USC 1972 note.

22 USC 1973 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a)(1) shall take effect March 1, 1977. The amendment made by subsection (a)(2) shall apply with respect to seizures of vessels of the United States occurring on or after December 31, 1974.

SEC. 404. MARINE MAMMAL PROTECTION ACT AMENDMENT.

(a) AMENDMENT.—Section 3(15)(B) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(15)(B)) is amended by striking

out "the fisheries zone established pursuant to the Act of October 14, 1966." and inserting in lieu thereof "the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect March 1, 1977. 16 USC 1362 note.

SEC. 405. ATLANTIC TUNAS CONVENTION ACT AMENDMENT.

(a) AMENDMENT.—Section 2(4) of the Atlantic Tunas Convention Act of 1975 (16 U.S.C. 971(4)) is amended by striking out "the fisheries zone established pursuant to the Act of October 14, 1966 (80 Stat. 908; 16 U.S.C. 1091–1094)," and inserting in lieu thereof "the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect March 1, 1977. 16 USC 971 note.

SEC. 406. AUTHORIZATION OF APPROPRIATIONS. 16 USC 1882.

There are authorized to be appropriated to the Secretary, for purposes of carrying out the provisions of this Act, not to exceed the following sums:

(1) $5,000,000 for the fiscal year ending June 30, 1976.

(2) $5,000,000 for the transitional fiscal quarter ending September 30, 1976.

(3) $25,000,000 for the fiscal year ending September 30, 1977.

(4) $30,000,000 for the fiscal year ending September 30, 1978.

Approved April 13, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-445 (Comm. on Merchant Marine and Fisheries) and No. 94-948 (Comm. of Conference).
SENATE REPORTS: No. 94-416 (Comm. on Commerce), No. 94-459 (Comm. on Foreign Relations), and No. 94-515 (Comm. on Armed Services) all accompanying S. 961, and No. 94-711 (Comm. of Conference).
CONGRESSIONAL RECORD:
Vol. 121 (1975): Oct. 9, considered and passed House.
Dec. 19, S. 961 considered in Senate.
Vol. 122 (1976): Jan. 19-22, 27, S. 961 considered in Senate.
Jan. 28, considered and passed Senate, amended, in lieu of S. 961.
Mar. 29, Senate agreed to conference report.
Mar. 30, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:
Vol. 12, No. 16 (1976): Apr. 13, Presidential statement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., and SECOND OCEANIC CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF NEW YORK STATE AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1235

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., and SECOND OCEANIC CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF NEW YORK STATE AS *AMICUS CURIAE*

Interest of *Amicus Curiae*

The interest of New York as *amicus curiae* which was set forth in our brief in support of the jurisdictional statement is repeated here for the convenience of the Court.

The State of New York claims ownership of the fish in its waters for purposes of regulation and control.* Along

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* Environmental Conservation Law § 11-0105

"The State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects, thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition."

with other coastal states, New York regulates commercial fishing in the waters off its coast. There are a number of State laws which preserve fish and shellfish stocks from depletion by requiring licensed fishermen or shell-fishermen to be residents, or by imposing greater license fees on non-residents. Environmental Conservation Law §§ 13-0311 (shellfish diggers), 13-0313 (shellfish growers), 13-0315 (shellfish shippers and processors), 13-0329 (lobsters), 13-0331 (crabs), 13-0333 (menhaden) and to citizens who are residents of the state, Environmental Conservation Law §§ 13-0335 (food fish), 13-0341(7) (beam and other trawls). Copies of these statutes are annexed hereto as Appendix A.

Unless the decision of the lower court is reversed, it will not only place the legality of these statutes in jeopardy, but will also endanger the historical management of fishing by New York and the other affected states in their coastal waters, endangering stocks of fish on which thousands of New Yorkers depend for a livelihood and many more for a source of food. New York like Virginia has a large body of inland water, Long Island Sound, as well as many bays which may be affected by this decision. These coastal areas are prime sources of both food fish and shellfish.

Opinion Below

The opinion below was entered by a three-judge court for the Eastern District of Virginia on November 7, 1975. It is not yet reported.

Jurisdiction

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered by a three-judge district court convened under 28 U.S.C. § 2884, on November 7,

1975. The jurisdiction of this Court rests on 28 U.S.C. § 1253. This Court noted probable jurisdiction of the appeal on April 26, 1976.

Constitutional and Statutory Provisions Involved

The United States Constitutional Provisions involved here are the Interstate Commerce Clause, Article I, § 8, cl. 3; the Supremacy Clause, Article VI, para. 2; and the Equal Protection Clause, Amendment XIV, § 1.

The statutory provisions involved are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1.

Questions Presented

1. Does 16 U.S.C. § 1081 preempt regulation of commercial fishing by states within their coastal waters?

2. Do state statutes creating classification of commercial fishing on the basis of residency and citizenship violate the Equal Protection Clause of the Constitution?

3. Is regulation of commercial fishing within a state's coastal waters an undue burden on interstate commerce?

Statement

This is an appeal from an order of the court below which found two statutes of the State of Virginia which set forth residency and citizenship qualifications for licensing to fish for menhaden to be unconstitutional.

The appellees, non-resident corporations, challenged the constitutionality of two provisions of the Code of Virginia of 1950, as amended, §§ 28.1-60 and 28.1-81.1, which regulate fishing in that State's coastal waters and bays. Suit

was brought against appellant Commissioner of Marine Resources of Virginia to enjoin his enforcement of the statutes.

Appellee Seacoast Products, Inc. is a Delaware corporation with principal offices in New Jersey. Appellee Smith Meal Corporation is a Massachusetts corporation with its main office in New Jersey. Second Oceanic Corporation is a New York Corporation and has its principal offices in New York. Smith Meal and Second Oceanic are wholly-owned subsidiaries of Seacoast, which in turn is ultimately controlled by Hanson Trust, Ltd., a corporation organized and existing under the laws of the United Kingdom. The appellee parent and subsidiary corporations have in the past engaged in taking menhaden from the coastal waters of Virginia, but in May of 1975 their applications for commercial fishing licenses were denied for failure to satisfy the United States citizenship requirements of the Virginia statutes.

Virginia Code § 28.1-60 permits licensing of a non-resident to fish for menhaden within the 3-mile coastal waters of Virginia, but denies except as to residents the right to fish in Chesapeake Bay. Virginia Code § 28.1-81.1 excludes all aliens from commercial fishing within the three-mile limit.

The three-judge court held that the Virginia statutes violated the appellees' rights under the Equal Protection Clause and that the statutes were preempted by 16 U.S.C. § 1081 *et seq.*

Argument

The legislatures of the states are presumed to have acted constitutionally and for valid reasons. *McDonald* v. *Board of Elections,* 394 U.S. 802, 809 (1969); *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963). The laws of Virginia or any other state should not be lightly set aside. When and if state laws are invalidated the reasons for such action should be particularized so that the scope and intent of the decision leaves no room for doubt contrary to the decision here at issue.

As the appellees here are foreign corporations under 46 U.S.C. § 802, it would appear at least questionable that they are entitled to claim an unconstitutional exclusion from fishing in Virginia waters, since the State of Virginia has the right to exclude them from doing business within the state. *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562, 571.

I. 16 U.S.C. § 1081 *et seq.* does not preempt the right of a state to regulate commercial fishing within its coastal waters

The thrust of 16 U.S.C. § 1081 *et seq.* is to deny foreign vessels the right to fish within United States coastal waters. The statute does, however, provide that under certain circumstances foreign vessels may obtain approval to fish within United States Territorial Waters. To conclude, as did the court below, that this statute preempts the historic right of the states to regulate fishing within their coastal waters is entirely without merit.

The authority of the states to conserve fish stocks and regulate fishing in their coastal waters in absence of conflicting federal legislation has long been recognized by this Court. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). Congress has made it clear that the states have the authority to regulate fishing within their coastal waters in the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 (e), 1311 (a).

A reading of 16 U.S.C. § 1081 makes it clear that it is devoid of any language which would support a finding that it was the intent of Congress to oust the states of their historic and fundamental jurisdiction over commercial fishing. Foreign vessels authorized to fish in United States territorial waters under that statute are no more exempt from compliance with the state regulatory statutes than

are vessels of United States citizens licensed to fish in United States territorial waters.

The jurisdiction of the states over their coastal waters has been clearly recognized by Congress in provisions in the Contiguous Fisheries Zone Act, 16 U.S.C. §§ 1094, and Coastal Zone Management Act of 1972, 16 U.S.C. 1451(h), and most recently in the Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331, approved April 13, 1976 [§ 306 (a)].

That a limited assertion of authority by Congress does not preclude non-conflicting action by the states is too well established to be disputed. *Askew* v. *American Waterways Operators,* 411 U.S. 325; *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132; *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440; *Skiriotes* v. *Florida,* 313 U.S. 69.

Appellees' argument that the licensing of their vessels under 46 U.S.C. §§ 251 (a) and 263 automatically preempted the State's regulatory authority is equally without merit. *Askew* v. *American Waterways Operators, Inc., supra; Huron Portland Cement Co.* v. *City of Detroit, supra; Toomer* v. *Witsell,* 334 U.S. 385. Such licensing of appellees' boats would merely permit fishing within United States Territorial Waters outside the three-mile limit, an area where menhaden are apparently also present, *Corsa* v. *Tawes,* 149 F. Supp. 771, 777 (D. Md. 1957) aff'd 355 U.S. 37 (1957).

II. State laws imposing a residency or citizenship requirement on the right to fish within that state's coastal waters do not violate the equal protection clause

The granting of summary judgment below in holding the Virginia statutes violative of the Equal Protection Clause barred the state from presenting any evidence at trial on the reasonableness of the classification. To the extent that that decision is a *per se* invalidation of a residency or citizenship requirement, it flew in the face of

the case law as enunciated by this Court. *Toomer* v. *Witsell, supra,* 334 U.S. at 369. See also *DeCanas* v. *BICA,* 44 L.W. 4236, 24 February 1976.

In *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410, relied on by the court below, this Court in fact stated that state regulations distingiushing between citizens and non-citizens are valid where they "protect special interests either of the state or of its citizens as such," *id.* at p. 417.

The District Court's heavy reliance upon *Takahashi, supra,* was in error. That was a case involving a patently odious racial discrimination, which was clearly improper. The imposition of a residency or citizenship requirement to preserve and protect the fish resources of a state is clearly on another footing.

The United States Congress recently recognized the necessity of protecting our off shore resources by extending the limit from 12 to 200 miles. Clearly the states should be able to preserve and protect their own coastal fisheries for the welfare of their own inhabitants from the prey and decimation of less concerned outsiders. The time for action by the state is before the destruction occurs. *Tawes, supra,* 149 F.Supp. at 774.

III. Regulation of commercial fishing within a state's coastal waters is not an undue burden on interstate commerce

Although the court below made no comment with respect to the regulation of commercial fishing being an undue burden on interstate commerce, such argument as to the Virginia statutes has been raised by the appellees. But the mere regulation of commercial fishing does not create an undue burden on interstate commerce, and more particularly residency and citizenship requirements do not create such a burden.

State statutes which regulate methods and equipment used in fishing constitute a reasonable regulation of a local concern. In the absence of conflicting federal regulation

under the commerce clause such regulation has uniformly been held to lie within the police power of the various states. *Alaska* v. *Artic Maid*, 366 U.S. 199, 203 (1961); *Toomer* v. *Witsell*, 334 U.S. 385, 393 (1948); *Skiriotes* v. *Florida*, 313 U.S. 69, 75 (1941); *Manchester* v. *Massachusetts*, 139 U.S. 240, 266 (1891); *Corsa* v. *Tawes*, *supra* at p. 773.

The imposition of the alternative requirement of a residency or citizenship requirement as a prerequisite to the right to fish is likewise not an undue burden on interstate commerce. *Toomer* v. *Witsell*, 334 U.S. 385 (1948). In *Toomer*, *id.* at pp. 394-95, this Court pointed out that the taking of fish (shrimp) occurs before they can be said to have entered commerce. Moreover, it is well settled that a state may in the absence of federal regulation exercise authority over a local concern even though such act has some impact on interstate commerce. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950); see also *Ferguson* v. *Skrupa*, *supra*; *Kelly* v. *Washington*, 302 U.S. 1, 9-10 (1937).

CONCLUSION

This Court should reverse the order appealed from in all respects.

Dated: New York, New York, June 29, 1976.

Respectfully submitted,

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Appendix A

§ 13-0311. Digger's permit to take shellfish for commercial purposes; when not required

1. Subject to the provisions of this article, a person who has been a resident of this state for six months immediately prior to the date of application may take shellfish from under water lands in the state for commercial purposes upon first obtaining a digger's permit from the department, provided, however, that the application for such permit by a person sixteen years of age or under shall be signed by his parent or legal guardian, who shall thereby consent to the issuance of the permit.

2. The department shall prescribe and furnish forms for application for such permit.

3. The fee for such permit shall be seven dollars and fifty cents. Such permit shall expire on December 31 of the year of issue. If it appears in the public interest, the department may, after hearing held on ten day's notice, suspend or cancel such permits, except that in case of a taking from an uncertified area such suspension or cancellation may be without prior notice.

4. The holder of such permit shall not ship or sell shellfish except to a holder of a valid Class A, D, or G shipper's permit who has a place of business in the township or borough in which such shellfish were harvested, without first obtaining a shipper's permit as provided in subdivision 1 of section 13-0315.

5. Subject to the provisions of this article, a person may, without permit, take from public certified areas not to exceed two pecks of shellfish in any one day for his own or his family use.

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6. The holder of such digger's permit shall carry the permit assigned to him on his person while engaged in the permitted activities, and the failure by such holder to exhibit his permit to any shellfish inspector, conservation enforcement officer, health official, peace officer or magistrate shall be presumptive evidence that no valid digger's permit has been issued to him.

§ 13-0313. Shellfish growers; definitions; bed permit

1. Any person resident in this state one year or more may engage in the cultivation and marketing of shellfish subject to the provisions of sections 13-0307, 13-0309, 13-0311 and 13-0319 and shall be known as a grower.

2. A grower shall not take shellfish, for shipping or marketing from lands owned, leased or rented by him, except upon permit of the department which shall certify that such lands lie within certified areas. The department shall prescribe and furnish forms for application for such permits.

3. The fee for such permit shall be twenty-five cents for each acre from which shellfish are to be taken; provided, however, that the minimum fee shall be five dollars. Such certificates shall expire on December 31 of the year of issue.

4. If it appears in the public interest, the department may suspend or cancel any such permit.

5. Where lands for which such permit has been issued are found to be in part within an uncertified area, the department shall issue without fee, a new permit covering the remaining portion of such lands.

6. In case of assignment or transfer of rights or ownership of any private or leased lands under water, or parts thereof, a new permit shall be required.

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§ 13-0315. Shellfish shipper's and processor's permit

1. Prior to the processing, transportation or shipment of shellfish, either in intra-state or inter-state commerce, an appropriate permit so to do shall be obtained from the department. Such permit shall be required of all shippers and dealers in fresh and frozen shellfish within the state, except retail dealers, and shall certify that the holder thereof has complied with all the requirements of sections 13-0309, 13-0311, 13-0313, 13-0317 and 13-0319.

2. A shellfish shipper's and processor's permit shall be granted to those applicants who comply with the rules and regulations of the department, except that no Class F permit as specified in paragraph f of subdivision 3 of this section shall be issued to a person less than eighteen years of age. The department shall prescribe and furnish forms for application for such permit.

3. Applicants shall pay, and the department shall be entitled to receive, fees according to the type of permit issued, as follows:

a. Class A permit, one hundred dollars. This permit shall allow the holder thereof and any person in his employ to cull, open, shuck, pack and repack shellfish, and to distribute and ship shellfish, either in the form of shell stock or as fresh or frozen open stock, in inter-state and intra-state commerce.

b. Class B permit, fifty dollars. This permit shall allow the holder thereof and any person in his employ to redistribute and reship shellfish which have been purchased from holders of Class A, D, E, F or G shipper's permits, either in the form of shell stock or as fresh or frozen open stock, in inter-state and intra-state commerce. Such redistributions and reshipments of fresh or frozen open

stock shall be made only in the original containers in which received, and shall not be tampered with in any way.

c. Class C permit, twenty-five dollars. This permit shall allow the holder thereof and any person in his employ to redistribute and reship shellfish, which have been purchased from holders of Class A, D, E, F or G permits, in the form of shell stock or as fresh or frozen open stock in intra-state commerce only. Such redistributions and reshipments of fresh or frozen open stock shall be made only in the original containers in which received, and shall not be tampered with in any way.

d. Class D permit, fifty dollars. This permit shall be issued only to growers and shell stock shippers, except reshippers, and shall allow the holder thereof and any person in his employ to call and pack shellfish in the form of shell stock only which have been harvested by the growers or purchased from shellfish shippers, or purchased from holders of diggers' permits who are residents in the town in which the permittee's place of business is located, and to distribute and ship the same in inter-state and intra-state commerce.

e. Class E permit. ten dollars. This permit shall allow the holder thereof to ship in inter-state and intra-state commerce shellfish in the form of shell stock only, which he has legally removed from natural or public shellfish grounds.

f. Class F permit, two dollars and fifty cents. This permit shall allow the holder thereof to distribute and ship in intra-state commerce shellfish in the form of shell stock only, which he has legally removed from natural or public shellfish grounds.

g. Class G permit, ten dollars. This permit shall allow the holder thereof and members of his immediate family,

or not more than two persons in his employ to open, shuck and pack bay scallops only and to distribute and ship bay scallops in the form of fresh open stock only, in intra-state commerce.

h. Shipper's permits shall expire on December 31 of the year of issue. The department may suspend or revoke any such permit at any time on failure of the holder thereof to comply with the conditions thereof.

§ 13-0329. Lobsters; permit to take; when not required; prohibited acts

1. A person may take lobsters (Homarus americanus) for commercial purposes upon first obtaining a permit from the department.

a. A person who has been an actual resident of the state for six months immediately prior to the date of application may take lobsters from the waters of the state upon first obtaining a permit from the department. For purposes of this paragraph the term "actual resident" shall mean a person who resides within the state at a bona-fide residence.

b. The department shall prescribe and furnish forms for application for such permit.

c. The fee for such permit shall be five dollars.

d. Subject to the provisions of this article, a person who is a resident of the state may take without permit not to exceed six lobsters for his own or family use in any one day.

2. Until January 1, 1979, a non-resident of the state who is a resident of a state that provides reciprocal permits or licenses to New York state residents or a person resident for less than six months immediately prior to the date of application may, upon first obtaining a permit from the

department, take lobsters only from the waters of the state westerly and southerly of a straight line drawn from the Flushing Green Light Number 9 Whistle Buoy at Cerebus Shoals (located approximately seven miles northwesterly to Montauk Point) northwesterly to Race Rock and thence due north to the New York-Connecticut interstate boundary line.

3. Lobster permits shall be nontransferable and shall expire on December 31 of the year of issue. If it appears in the public interest, the department may suspend or cancel any such permit on ten days' written notice to the holder thereof.

4. Buoys or markers of prescribed design shall be used in designating the location of licensed lobster pots or traps in such manner as shall be required by the department.

5. a. Except as provided in subdivision 4 of section 11-0515 only lobsters measuring three and three-sixteenths inches or more from the rear end of the eye socket along a line parallel to the center line of the body shell (carapace) to the rear end of the body shell (carapace) may be taken, possessed, bought, sold, imported and exported.

b. A lobster that has been damaged or mutilated to the extent that its length from the rear end of the eye socket along a line parallel to the center line of the body shall (carapace) to the rear end of the body shell (carapace) cannot be determined shall not be possessed, sold or trafficked in, except that a detached lobster tail composed of the six abdominal segments and fan in the shell (fan composed of uropods and telson) may be possessed, sold or trafficked in provided that the sixth abdominal segment, being that segment nearest the fan, is one and one-sixteenth inches long or more when measured along the dorsal center line with the tail flexed.

c. Lobsters in spawn shall not be taken or possessed at any time.

d. Detached lobster claws may be possessed only in conjunction with legally possessed detached lobster tails. The number of detached lobster claws in possession shall not exceed twice the number of legally possessed detached lobster tails.

e. Landing of lobster or parts thereof not in the shell is prohibited.

6. No person shall unduly disturb or without the consent of the licensee take or remove lobsters from a lobster pot or trap or other commercial gear.

7. It is unlawful for the operator of a motor vehicle, boat, vessel or conveyance of any kind, or any person, who has been requested or signaled to stop by an enforcement officer to throw or dump into the water any lobster, or the contents of any jail, bag, barrel or any matter whatsoever, before the enforcement officer has inspected the same.

§ 13-0331. Crabs; permit to take; prohibited acts

1. No person shall take blue-claw crabs (Callinectes sapidus) for commercial purposes without first obtaining a permit from the department.

2. A person who has been a resident of the state for six months immediately prior to the date of application may take crabs for commercial purposes from the waters of the state upon first obtaining a permit from the department.

a. The department shall prescribe and furnish forms for application for such permit.

b. The fee for such resident crabbing permit shall be fifteen dollars.

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3. A non-resident of the state or a person resident for less than six months immediately prior to the date of application may take crabs, for commercial purposes, only from the waters of Lower Bay and Raritan Bay southerly of a straight line drawn from Point Fort Wadsworth, Staten Island to Norton Point, Coney Island, upon first obtaining a non-resident crabbing permit from the department.

a. The department shall prescribe and furnish forms for application for such permit.

b. The fee for such non-resident crabbing permit shall be twenty-five dollars.

4. Permits are not transferable and shall expire on December 31 following the date of issue. If it appears in the public interest, the department may suspend or cancel such permits without prior notice.

5. Female crabs with eggs visible thereon, commonly called sponge crabs or any female crabs from which the egg pouch or bunion has been removed shall not be taken, possessed, transported or offered for sale at any time.

6. Crabs shall not be taken by dredging in the waters of Hempstead bay and South Oyster bay in the county of Nassau or in the waters of Great South bay west of Captree bridge in the county of Suffolk.

§ 13-0333. Menhaden; license; prohibited acts

1. Menhaden or other fish, from which oil or fertilizer is made, subject to the provisions of section 13-0343, may be taken from the waters of the marine district provided a license is first obtained from the department.

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2. Each license shall be issued to cover one boat into which such fish are taken and shall be issued in the name of the owner, lessee or operator of each boat so used. License fees shall be computed on the basis of gross tonnage of the vessel to be licensed as indicated in the document, certificate of award, register, enrollment or license of such vessel issued by the United States Collector of Customs.

3. The license fee shall be: For each vessel of sixty gross tons or over, two hundred dollars; for each vessel of less than sixty gross tons, twenty-five dollars. All licenses issued under this section shall expire on December 31 following date of issue.

4. Non-residents of the state shall not fish for menhaden with purse nets in the Atlantic Ocean within three nautical miles of shore from Fire Island lighthouse to Romer Shoal lighthouse.

5. In the area of Long Island Sound extending from Buoy 13 off Eatons Neck in Suffolk County westerly to Buoy 44 off Execution Rocks and off the shoreline of Westchester County extending from Buoy 36 westerly to said Buoy 44, commercial menhaden seines may not be operated closer to shore than the following limits determined primarily from the Long Island Sound ship channel buoy line:

(a) From Buoy 13 (north shore of Long Island) to Buoy 44 (off Execution Rocks)—seining vessels must not operate closer to shore than the lines connecting the designated buoys and navigational aids.

(b) From Buoy 36 (off the shoreline of Westchester county) to Buoy 44 (off Execution Rocks)—seining vessels must operate at least one-half mile seaward from the lines connecting the designated buoys and navigational aids.

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Distances shall be determined from straight lines drawn between the designated buoys and navigational aids.

The following buoys and navigational aids shall be considered to be the line of demarcation: north shore of Long Island—Buoys 13, N4 (Huntington Bay) 15, 17, 19, 21 N4 (Hempstead Harbor) 23, 44 (off Execution Rocks); Westchester County—commencing at the New York state border on a line projected from Great Captain Island light to Buoy 36, Buoys 36, 38, 38A, 40, 40A, 42, black can C1 designating the port side of the Echo Bay channel entrance off New Rochelle, Buoy 44 (off Execution Rocks). As amended L.1974, c. 455, § 1.

§ 13-0335. Food fish; license; prohibited acts

1. A citizen resident of the state for not less than six months immediately preceding such taking may without license take food fish in the marine district (a) with beam traws and otter trawls, except in the Hudson river and in those waters described in section 13-0341 or section 13-0343 in which use thereof is prohibited, and (b) with nets other than beam trawls and otter trawls, except in the Hudson River and in the waters described in section 13-0343 to the extent that use of such nets is prohibited by that section in those waters.

2. Boats of non-residents may be licensed to take food fish in the marine waters of New York with beam and otter trawls, (a) operated solely from boats and (b) except with beam and other trawls in those waters described in section 13-0341 or section 13-0343, provided the boat is registered in a state which accords reciprocal fishing privileges, and provided the owner and captain are citizens of the United States and residents of a state according reciprocal privileges to residents of this state. The license shall be issued in the name of the boat.

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3. The license fee and the terms of the license specified in subdivision 2 of this section shall be as follows:

a. The fee shall be computed on the basis of four dollars per lineal foot or fractional part thereof of the registered length of the boat or vessel to be licensed as indicated on its document, certificate of award, register, enrollment or license, issued by the United States Collector of Customs;

b. Such license shall not be transferable;

c. Each license shall expire on the thirty-first day of December next succeeding its issue;

d. If it appears in the public interest the department may suspend or cancel any such license on ten day's notice in writing to the holder thereof.

4. It shall be unlawful for any person to render food fish into fertilizer.

5. No person shall take or remove from any legally set or operated nets or other commercial gear in the waters of the marine district any fish or crustacea without permission of the owner thereof, nor possess any fish or crustacea that has been so taken or removed.

§ 13-0341. Beam trawls and otter trawls; use prohibited in certain waters

Beam trawls and otter trawls shall not be set or used in the water areas of the marine district described in the following subdivisions:

1. In the waters of the county of Richmond and in the counties of Kings or Queens, northerly and westerly of a line from the sea end of the breakwater at Rockaway Point to Romer Shoal lighthouse, including Jamaica Bay and its adjacent bays, inlets, creeks and basins.

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2. In the Atlantic Ocean within one-half mile of the coastline and in all connecting tidal waters inshore of the coastline, from Rockaway Inlet Jetty to the Town of Babylon bathing pavilion at Cedar Island Beach, and in all tidal waters inshore of a line from the Town of Babylon bathing pavilion to the sea buoy (BW S-I, Bell) at the entrance of Fire Island Inlet and thence to the seaward end of Fire Island Inlet Jetty.

3. Moriches Inlet, in Shinnecock Inlet and in Mecox Inlet within one-half mile of the narrowest part of the mouths of such inlets.

4. In Manhasset Bay southerly of a line from Barker's Point to Hewlett's (King's) Point; in Hempstead Harbor southerly of a line from Mott's Point easterly through the breakwater at Glen Cove, and in the Nissequogue River.

5. In the Harlem River and the East River east of the Triborough Bridge and in Long Island Sound west of a line drawn from Hewlett's (King's) Point to the north end of Hart Island, thence to the south end of Glen Island, and in their adjacent bays, coves, creeks and confluent waters.

6. In Flanders Bay, Great Peconic Bay, Little Peconic Bay, Noyac Bay and Shelter Island Sound, including all waters forming a part thereof or tributary thereto, lying westerly and southerly of an imaginary line extending from Conklins Point to Jennings Point and westerly and northerly of a imagianry line extending from South Ferry on Shelter Island to North Haven from April 15 to October 1.

7. In the county of Suffolk in the waters lying westerly of an imaginary line extending in a southerly direction from the most easterly end of Plum Island to the most

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northerly end of Gardiners Island, and westerly of Gardiners Island, and westerly of a line extending in a southerly direction from the most southerly end of Gardiners Island to Goff Point; provided, however, that vessels and motorboats owned and operated by citizens who are residents of the state may be used in such waters in connection with the operation of beam trawls and otter trawls and other types of nets towed by such boats and vessels. Nothing in this subdivision shall be construed as legalizing the operation of any beam trawls or otter trawls in the waters described in subdivision 6 of this section from April 15 to October 1.

8. In Long Island Sound west of an imaginary line from the New York-Connecticut boundary shore line extending easterly and southerly to Eaton's Point Neck on Long Island from April 1 to November 1.

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1975

No. 75-1255

JAMES E. DOUGLAS, JR.

Appellant,

v.

SEACOAST PRODUCTS, INC., et al.,

Appellees

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF AMICI CURIAE ON THE MERITS

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In The

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JAMES E. DOUGLAS, JR.
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On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF AMICI CURIAE ON THE MERITS

INTEREST OF AMICI CURIAE

The interests of the Amici Curiae are set out in the Brief Amicus Curiae in Support Of Statement As To Jurisdiction filed by the State of Maine.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on November 1, 1975. It is not yet reported.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered on November 7, 1975 by a three-judge district court convened under 28 U.S.C. § 2284. The jurisdiction of this Court rests on 28 U.S.C. § 1253. This Court noted probable jurisdiction of this appeal on April 26, 1975.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Supremacy Clause, Article VI, Cl. 2 and the Equal Protection Clause Amendment XIV Sec. 1.

QUESTIONS PRESENTED

Whether a state statute which prohibits non residents from fishing stocks concentrated in internal waters violates the Equal Protection Clause of the Fourteenth Amendment.

Whether the Bartlett Act, 16 U.S.C. § 1081 et seq, preempts state regulation of domestic sea fisheries within its marine boundaries.

STATEMENT

The three judge court held that Section 28.1-60 of the Virginia Code violates the Equal Protection Clause and enjoined Virginia's exclusion of non-residents fishing in internal waters.

The lower court also held that the Bartlett Act, 16 U.S.C. 1081 *et seq.*, preempted 28.1-81-1 of the Virginia Code as well as "Virginia's control of commercial sea fisheries and supersedes state regulation of them".

ARGUMENT

I. The Equal Protection Clause Does Not Prohibit the Exclusion of Non Resident Fishing in the States Internal Waters.

The states submitting this brief do not specifically exclude alien fishing within their coastal waters. The sole objection of each state is that the lower court erroneously declared Virginia Code 28.1-60 violative of the equal protection clause. The Virginia statute prohibits non residents from fishing in Chesapeake Bay which is historic internal waters of the United States. *U. S. v. Alaska*, 422 US 184, 155 (1975). Within internal waters, the state owns and exercises jurisdiction over the seabed and subsoil. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1945); *U. S. v. California*, 332 U.S. 19, 30 (1947); *U. S. v. Texas*, 339 U.S. 707, 717 (1950). In *Smith v. Maryland*, 59 U.S. 71 (1855), the states' ownership of fish within internal waters was recognized. In *McCready v. Virginia*, 94 U.S. 391 (1876), the Court held that property rights in free swimming fish in inland waters belonged to people of the state in their united sovereignty and could be appropriated to them by the state's exclusion of non residents. Subsequently, the Court affirmed the state's right to exclude non citizens from fishing within its waters. *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906).[1] *Traux v. Raich*, 239 U.S. 33, 39-40 (1915). These decisions specifically uphold Virginia's right to exclude non residents from internal waters. While non residents in *McCready* sought to invoke the privileges and immunities clause, the court's reasoning applies equally to the lower court's application of the equal protection clause in this case. In *McCready*, the Court held that non residents are not invested with any interest in the common property of the citizens of another state. Since non residents do not possess even a threshold interest in the state's allocation of internal water fisheries, they have no right which can be protected by the constitutional provision upon which they have relied.

II. The Lower Court Erroneously Concluded That the Bartlett Act Preempted State Control of Commercial Sea Fisheries.

The District Court found that the Bartlett Act, 16 USC 1081, preempted Virginia Code 28.1-81.1. The

[1] For purposes of this decision, the Court assumed the states owned the territorial sea. This assumption was altered by the decision in *U. S. v. California*, 332 U.S. 19 (1947) which limited state ownership to internal waters. Subsequently, the Submerged Lands Act extended state ownership to the territorial sea. 43 USC 1301 *et seq.*

Bartlett Act prohibits all vessels except vessels of the United States from fishing in the territorial waters of the United States or in any waters where the United States has the same right with respect to the fisheries as it has in the territorial sea. Since the United States has the same right with respect to the fisheries in internal waters as it has in the territorial sea, the Bartlett Act operates to exclude foreign flag vessels in both zones of maritime jurisdiction. The Virginia statute, 28.1-81.1, prohibits licensing of persons, firms, partnerships and associations which are not citizens of the United States and of corporations which are not at least 75 percent owned by United States citizens.

The sole objection to the lower court's decision is the unnecessary but seriously adverse holding that the Bartlett Act preempted Virginia's control of commercial sea fisheries and superseded state regulation of them. Since this statement was made in the context of preemption of the state's alien corporation law, it is unclear whether the Court intended to extend this holding to preemption of state control and regulation of domestic sea fisheries. Nonetheless, the consequences of that extension, if intended, would be so severe we must oppose it.

The states authority to regulate fisheries in inland waters and the territorial sea is well established. *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941); *Toomer v. Witsell*, 334 U.S. 385, 393 (1948). While upholding state jurisdiction in these cases, the Court indicated that state management was subject to preemption by legislation establishing federal management of specific fisheries. However, in 1953, Congress passed the Submerged Lands Act, 43 USC 1301 *et seq.*, which established the Federal government's intention to leave the subject of domestic fisheries management exclusively to the states within the area of territorial sea and inland waters contained within state boundaries. The Act provides:

> "1311 (a) It is determined and declared to be in the public interest that (2) the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable state law be and they are subject to the provisions hereof recognized, confirmed, established, invested and assigned to the respective states . . . ."

No further federal legislation even arguably affecting state authority to manage domestic fisheries was passed prior to passage of the Bartlett Act in 1964. The Bartlett Act recognized the state interest in the fisheries by requiring state concurrence prior to authorization of any foreign vessels to fish in the territorial sea of the United States, 16 USC 1081. Two years later, the states jurisdiction in the territorial sea was expressly affirmed by the Contiguous Fisheries Zone Act, 16 USC 1091 which extended the prohibition of foreign fishing nine miles seaward of the territorial sea. In relevant part, the Act declared:

> "Nothing in this chapter shall be construed as diminishing their [the states] jurisdiction to such resources beneath and in the waters of the territorial seas of the United States." 16 USC 1094.

Subsequent federal legislation has also confirmed state authority to regulate the fisheries in internal and territorial waters. The Atlantic Tunas Convention Act, 16 USC 971, specifically affirms the priority of state management authority within the territorial sea by prohibiting federal regulations from taking effect in that area unless the state has refused to enforce regulations which will achieve the objectives imposed on the states by international agreement. Under this Act, the federal government can not preempt state control and regulation of the tuna fishery in the territorial sea unless the state regulations for conserving the fishery are insufficient. 16 USC 971g (d). Had the Bartlett Act preempted state authority to regulate tuna, as the lower court concluded, Congress would not have shown such deference for state authority. The

Fisheries Conservation and Management Act of 1976, 16 USC 1801, also established the states right to manage the coastal fisheries in the territorial sea. The Act provides that nothing in this Act shall be construed as extending or diminishing the jurisdiction of authority of any state within its boundaries unless, after hearing, the Secretary of Commerce finds that fishing in a fishery covered by a management plan occurs predominantly within the fishery conservation zone and that the state has taken or not taken action which will substantially and adversely affect the fisheries management plan. 16 USC 1856.

The provisions of subsequent legislation demonstrate that the Bartlett Act did not preempt state fisheries management authority in the territorial sea or inland waters. Any remaining uncertainty about the impact of the Bartlett Act upon state regulatory authority is finally resolved by the repeal provisions of the Fisheries Conservation and Management Act. Because the Bartlett Act is repealed by the Fisheries Act, 16 USC 1881, a failure to reverse or limit the lower court's position with respect to state fisheries management authority will leave all coastal fisheries at least temporarily unmanaged and some of only local distribution permanently unmanaged.

For all these reasons, the lower court's decision that the Bartlett Act preempted state control of commercial sea fisheries is erroneous and should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
APPELLANT,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC.,
and SECOND OCEANIC CORPORATION,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMICUS CURIAE, THE COMMONWEALTH OF MASSACHUSETTS, SUPPORTING THE APPELLANT ON THE MERITS

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Interest of the Commonwealth of Massachusetts

The Commonwealth of Massachusetts currently has in force several statutes which, like the Virginia statutes here at issue, impose restrictions upon nonresidents and resident noncitizens relative to fishing in the State's territorial

waters.[1] A decision in this case will have a substantial *stare decisis* effect on present and future cases challenging the validity of such statutes.[2]

Accordingly, in addition to the arguments advanced by the appellant and various other *amici curiae* in support of the appellant, Massachusetts sets forth the following points.

Argument

I. The Enactment of 16 U.S.C. § 1081 (1974) Has Not Preempted the Power of Virginia To Impose the Residency and Citizenship Requirements Contained in Va. Code §§28.1-60 and 28.1-81.1 (1950).

An exercise of federal power preempts an exercise of state power only when the former is necessarily inconsistent with the latter. *See, e.g., Skiriotes* v. *Florida,* 313 U.S. 69, 75 (1941). No such inconsistency exists between the provisions of 16 U.S.C. § 1081 (1974) and the residency and citizenship requirements contained in Va. Code §§28.1-60 and 28.1-81.1 (1950).

The provisions of 16 U.S.C. § 1081 (1974) address only the rights of foreign vessels. They are completely silent relative to the rights of domestic vessels. With respect to

[1] Specifically, such statutes are Mass. Gen. Laws Ann. ch. 130, §§38 and 55 (1976); Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended* by Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107; and Act of March 23, 1936, Ch. 158, [1936] Mass. Acts and Resolves 153.

[2] It should be noted that, on March 12, 1976, the Supreme Judicial Court of Massachusetts rendered a decision to the effect that the restrictions imposed on nonresidents by the Act of Feb. 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219 [1962] Mass. Acts and Resolves 107, are violative of the Privileges and Immunities Clause of U.S. Const. Art. IV, §2(1). *Commonwealth* v. *Westcott,* Mass. Adv. Sh. (1976) 696. On June 7, 1976, the Attorney General of Massachusetts filed with this Court a petition for a writ of certiorari relative to such decision. *Massachusetts* v. *Westcott* (U.S.S.C. No. 1775), which petition remains pending before the Court.

foreign vessels, the statute generally excludes said vessels from fishing in United States waters. To the extent that said vessels are permitted to fish in United States waters, the permission is contingent upon the "concurrence" of the States "directly affected." Under such circumstances, 16 U.S.C. § 1081 (1974) can hardly be said to conflict with, and thereby preempt, the operation of Virginia's residency and citizenship requirements.

There is a second reason why 16 U.S.C. § 1081 (1974) should not be construed as preempting Virginia's residency and citizenship requirements. The right to determine who may or may not take fish is a right derived from ownership. *See McCready* v. *Virginia,* 94 U.S. 391, 395-396 (1877). *See also, Geer* v. *Connecticut,* 161 U.S. 519, 523-534 (1896). In that regard, Congress has, through the passage of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970), expressly established that the ownership of fish found within three miles of each State's coastline lies exclusively in that State. It has thereby also established that each State possesses the exclusive power, subject to relevant constitutional requirements, to determine who may and who may not take such fish.[3] Thus, to construe 16 U.S.C. § 1081 (1974) as superseding an exercise of that power would effect an implied repeal of the Submerged Lands Act. Because of this Court's traditional hostility to the doctrine of implied repeal, that construction should be rejected. *See Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974).

Accordingly, it is plain that 16 U.S.C. § 1081 (1974) has not preempted Virginia's attempt, through Va. Code §§28.1-60 and 28.1-81.1 (1950), to restrict the right of nonresidents and resident noncitizens to fish in its waters.

[3] Although Congress expressly retained the power to regulate commerce, navigation, national defense and international affairs within State territorial waters, said power does not, by itself, include the right to determine who may and who may not take fish. *See The Abby Dodge,* 223 U.S. 166, 174 (1912); *McCready, supra.*

II. Neither the Residency Requirement of Va. Code §28.1-60 (1950) nor the Citizenship Requirement of Va. Code §28.1-81.1 (1950) Violates the Equal Protection Clause.

Distinctions drawn by a State in the course of economic regulation comport with the requirements of the Equal Protection Clause so long as they are rationally related to a legitimate State purpose. *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949). Both the distinction drawn by Va. Code §28.1-60 (1950), between residents and non-residents, and that drawn by Va. Code §28.1-81.1 (1950), between citizens and non-citizens, meet the standard of constitutionality.

By virtue of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970), the citizens of each State, in their collective sovereignty, possess exclusive ownership rights in all of the fish found within the territorial waters of that State.[4] Non-residents and aliens, not being citizens of the State, possess no such ownership rights. Thus, in withholding the right to take fish from those who are non-residents or resident non-citizens, Va. Code §§28.1-60 and 28.1-81.1 (1950) further the purpose of preserving an important natural resource for the exclusive use of those who own the resource. The furtherance of such a purpose on the part of the State is clearly within its police power.[5]

[4] Prior to passage of the Act, this Court had held that the States possessed no common law rights of ownership in fish found in the marginal sea. *Toomer* v. *Witsell*, 334 U.S. 385, 395-402 (1948).

[5] While language in *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948) may suggest that a distinction drawn between citizens and resident non-citizens relative to the right to take fish is violative of the Equal Protection Clause, the distinction actually presented in that case was one between non-citizens of a particular nationality and all other non-citizens. Thus, the Court's discussion of the broader distinction was unnecessary. For that reason, and in light of the precedent in favor of a contrary view, *Takahashi* should not be deemed controlling in this case.

Geer, supra at 534-535. *See also Commonwealth* v. *Westcott*, Mass. Adv. Sh. (1976) 696, 715 (Reardon, J., dissenting).

Accordingly, neither the residency requirement of Va. Code §28.1-60 (1950) nor the citizenship requirement of Va. Code §28.1-81.1 (1950) is violative of the Equal Protection Clause.

Conclusion

Massachusetts urges that the decision of the United States District Court for the Eastern District of Virginia be reversed.

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IN THE

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No. 75-1255.

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V.

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Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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Appelles.

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BRIEF OF THE STATE OF DELAWARE

INTERESTS OF THE STATE OF DELAWARE AMICUS CURIAE

The interests of Delaware have been specified in its Brief in Support of Statement As to Jurisdiction.

We hereby adopt the Preemption Argument II-A and II-B of the Brief Amici Curiae on the Merits filed by Ammon G. Dunton, Jr., et al.

II-A. THE POWER OF THE INDIVIDUAL STATES TO REGULATE FISHERIES IN STATE INLAND WATERS AND IN THE MARGINAL SEA HAS NOT BEEN PREEMPTED BY THE BARTLETT ACT, 16 U.S.C. §§1081, ET SEQ.,

and

II-B. THE POWER OF THE COMMONWEALTH OF VIRGINIA TO REGULATE FISHING WITHIN ITS BOUNDARIES THROUGH VIRGINIA CODE SECTIONS 28.1-60 and 28.1-81.1 HAS NOT BEEN PREEMPTED BY THE SHIPPING ACTS OR BY ANY OTHER CONTROLLING FEDERAL LAW.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (App. 16–22) is not yet reported.

JURISDICTION

On November 7, 1975, the district court entered its order and final judgment enjoining enforcement of Virginia Code 28.1–60 and 28.1–81.1 "in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia" (App. 15).

Appellants filed their notice of appeal on March 5, 1976, and probable jurisdiction was noted on April 26, 1976. This Court's jurisdiction rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether Va. Code 28.1–60 and 28.1–81.1 conflict with the federal enrollment and licensing laws in regard to fisheries and are therefore unconstitutional under the Supremacy Clause of the Constitution.

2. Whether Va. Code 28.1–81.1 is preempted by the Bartlett Act, as amended, 16 U.S.C. 1081–1094.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Virginia Code 28.1–60 and 28.1–81.1 are set forth in the Appendix, at pp. 114–118.

Section 1 of the Bartlett Act of 1964, 78 Stat. 194, as amended, 16 U.S.C. 1081, is set forth in the Appendix, at pp. 118–119.

The following provisions are set forth in an appendix to this brief: 46 U.S.C. 251, 252, 263.

INTEREST OF THE UNITED STATES

In its order noting probable jurisdiction, the Court invited the United States to express its views in this case. The substantial interest of the United States is indicated by the federal legislation involved here and the likelihood that the Court's decision in this case, interpreting federal statutes, will have a significant impact on federal-state relationships with respect to the regulation of fishing in the territorial sea adjacent to the States and in the internal waters of the States.

STATEMENT

This is an appeal from the decision of a three-judge district court holding Va. Code 28.1–60 unconstitutional and Va. Code 28.1–81.1 preempted by federal law.

Va. Code 28.1–60 prohibits nonresidents of Virginia from taking, without a license, fish in state waters or waters under the state's "joint jurisdiction" for "the purpose of converting [the fish] into oil, fish scrap, fish meal or guano." Licenses granted under this section to nonresident individuals or companies authorize only their fishing for "menhaden" east of a line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse and within the three-mile limit of the Virginia coast during a specified season (between the third Monday of May and the third Friday of November).[1] See also Va. Code 28.1–59(d)(2). The effect of

[1] Residents are also required to adhere to the same fishing season for menhaden, although they are not restricted to fishing only outside the Chesapeake Bay as are nonresidents. Va. Code 28.1–65.

Section 28.1–60, therefore, is to prohibit entirely nonresidents from fishing for menhaden in the Chesapeake Bay.[2]

The other state statute involved here, Va. Code 28.1–81.1, became effective on March 19, 1975. This provides that no commercial license shall be granted to any person, firm, partnership or corporation for the taking of any "food fish" or fish to be manufactured into fish meal, fish oil or fish scrap if the person, firm or corporation is not a United States citizen. Under this state statute, which imposes requirements in addition to those under other state licensing provisions, a corporation is not a citizen of the United States unless seventy-five percent of the interest in it is owned by United States citizens; its president, chairman of the board of directors and majority of the directors needed to constitute a quorum are citizens of this country; and it is organized under federal or state law.

The effect of Section 28.1–81.1 is to bar noncitizens, as therein defined, from obtaining commercial fishing licenses for any kind of fish from the Commonwealth of Virginia regardless of where the noncitizens reside.[3] This case concerns the application of Section 28.1–81.1 with respect to the menhaden fishery.

[2] The waters of the territorial sea, as well as inland waters, are within the State's boundary. See the Submerged Lands Act, 67 Stat. 31, 43 U.S.C. 1312.

[3] Apparently, even residents of Virginia would not be allowed to obtain commercial fishing licenses if they were not considered citizens of the United States under Section 28.1–81.1.

The menhaden[4] is a non-edible herringlike fish that averages from four to fourteen inches in length. There are several species that range along the Atlantic Coast and the Gulf of Mexico, but the most common is the Atlantic menhaden (*Brevoortia tyrannus*), which is found from New England to Florida. The menhaden fishery annually contributes approximately forty-five percent of the total United States commercial catch of fresh and saltwater fish combined (App. 99).

The menhaden catch is processed into fish meal, fish oil and fish solubles (*id.* at 33). Fish meal and solubles are rich in protein and are used as food supplements for poultry and other animals; fish oil is domestically used in various commercial products including paints, soaps and lubricants and is exported to Europe and Canada for use in the manufacture of margarine; fish meal is also used by pharmaceutical companies in

[4] It is commonly called the mossbunker, bunker, pogy and fatback. See generally Atlantic States Marine Fisheries Commission, *Atlantic Menhaden*, Leaflet No. 2, October 1965; Evanoff, *Menhaden*, in 36 *The Salt Water Sportsman* No. 9, p. 70 (September 1975).

[5] *Ibid.* See generally Nicholson, *Age and Size Composition of the Atlantic Menhaden, Brevoortia tyrannus, Purse Seine Catch, 1963–71 With A Brief Discussion Of The Fishery* (June 1975) (National Oceanic and Atmospheric Administration Technical Report NMFS SSRF–684); Kroger & Guthrie, *Migrations of Tagged Juvenile Atlantic Menhaden*, in 102 Transactions of the American Fisheries Society No. 2, 417 (April 1973); Schaaf & Huntsman, *Effects of Fishing on the Atlantic Menhaden Stock: 1955–1969*, in 101 *id.* at 290 (April 1972); Dryfoos, Cheek & Kroger, *Preliminary Analysis of Atlantic Menhaden, Brevoortis Tyrannus, Migrations, Population Structure, Survival and Exploitation Rates, and Availability As Indicated From Tag Returns*, 71 Fishery Bulletin 719 (1973).

the manufacture of antibiotics (*id.* at 33; *Atlantic Menhaden, supra*, note 4).

Atlantic menhaden spawn in the ocean over the Continental Shelf.[6] Fish hatched at sea off the coast of Virginia and north of Cape Hatteras, North Carolina,[7] tend to migrate into the Chesapeake and Delaware Bays in late winter or early spring (App. 74, 95). It appears that as many as ninety-five percent of the menhaden found in the Chesapeake Bay began their lives outside the Bay's waters (App. 98).

When they enter the Chesapeake Bay, the fry spread out through the Virginia and Maryland portions of the Bay (App. 95). Evidence developed from tagging operations conducted by the National Marine Fisheries Service indicates that of the one-year old fish tagged as juveniles in the Bay, a majority are caught there while others have been captured along the Atlantic coast as far south as Florida (App. 74–75, 96). It is not known how many of the one-year-old fish caught in the Bay had spent the preceding winter there (App. 96); at least some had left the Bay in the fall and returned the following spring (App. 75). Older fish—more than two years of age—tend to live outside the Bay, migrating southward in the fall, spending the winter at sea in an area not precisely known, and heading northward along the coast as summer approaches (App. 75, 95–97). Because female menhaden do not spawn until they are three years of age (App. 94),[8] repopulation of the Chesapeake Bay is dependent upon these three-year old or older fish spawning in the ocean off the mid-Atlantic Coast (App. 76, 99).[9]

[6] App. 93–95; *Atlantic Menhaden, supra*, note 4; note 5, *supra*.

[7] Fish hatched at sea south of Cape Hatteras tend to move toward the southern coast, entering estuaries from North Carolina to Florida (App. 94). See Dryfoos, Cheek & Kroger, *supra*, note 5.

During the summer months menhaden are found in dense schools close to the surface and are easily spotted because of the characteristic ripple they create (App. 24; note 4, *supra*). Most of the menhaden caught commercially along the Atlantic Coast are taken during this period; purse seines are used to capture the fish, which are then refrigerated and later processed on shore (App. 24, 33). It is not commercially feasible to fish for menhaden during the winter months when they are far off-shore in deeper waters (App. 24); the great percentage of the commercial catch is taken within three-miles of shore (App. 24).

Appellees Seacoast Products, Inc., and its wholly owned subsidiaries The New Smith Meal Company, Inc., and Second Oceanic Corporation are engaged in the business of fishing for menhaden and in processing the fish for commercial purposes (App. 17, 18). Each company is incorporated and has its principal place of business in a State other than Virginia.[10] Since 1973,

[8] Menhaden are known to live as long as twelve years but very few reach that age (App. 75).

[9] Approximately ninety percent of the commercial menhaden catch in the Chesapeake Bay consists of one and two year old fish (App. 77).

[10] Seacoast is incorporated in the State of Delaware and has its principal place of business in New Jersey; Smith Meal is incorporated in the Commonwealth of Massachusetts and has its principal place of business in New Jersey; Oceanic is incorporated in the State of New York and has its principal place of business in New York (App. 2, 18, 29).

Seacoast has been controlled, through stock ownership, by a Delaware corporation which in turn is owned by Hanson Trust Limited, a corporation organized and existing under the laws of the United Kingdom (App. 18).

Prior to the sale of stock to Hanson Trust, Seacoast and Smith Meal transferred their sixty-eight vessels to an individual who then sought the authorization of the Secretary of Commerce under 46 U.S.C. 808, 839, to transfer ownership of the vessels back to Seacoast and Smith Meal after Hanson Trust had assumed control (App. 29–30). The Secretary approved the transfer after public hearings were held to determine, among other things, the effect of the transfer on the menhaden fishery and the menhaden segment of the commercial fishing industry (App. 20–21, 31).[11]

Thereafter, the Seacoast and Smith Meal vessels were re-enrolled and relicensed as fishing vessels of the United States. This entitled them "to the privileges of vessels employed in the coasting trade or fisheries," 46 U.S.C. 251 (a) (App. 20–21, 31–32).

On May 22, 1975, appellee Smith Meal applied to the Virginia Marine Resources Commission for a Virginia menhaden license. In previous years the state Commissioner had issued such licenses to Seacoast or its subsidiaries (App. 62). In 1975, however, the state Commissioner refused to issue the license to Smith Meal on the basis that Smith Meal was held directly or indirectly by foreign interests and, under Va. Code

[11] See generally 46 C.F.R. Part 221.

28.1–81.1, was therefore ineligible for a fishing license (App. 34).

On July 14, 1975, appellees brought suit against James E. Douglas, Jr., Commissioner of the Virginia Marine Resources Commission, in the United States District Court for the Eastern District of Virginia, seeking an injunction against the operation of Va. Code 28.1–81.1 insofar as it barred noncitizens from obtaining Virginia fishing licenses and Va. Code 28.1–60(3) insofar as it prohibited nonresidents from fishing for menhaden in the Chesapeake Bay (App. 2–9). Appellees' complaint alleged that these Virginia statutes violate the Equal Protection Clause of the Fourteenth Amendment and imposed an unreasonable burden on interstate commerce in violation of Article I, Clause 8 of the Constitution (App. 8). A three-judge district court was convened (App. 16).

On appellees' motion for summary judgment, the district court held that Va. Code 28.1–60 deprived appellees of equal protection of the laws by discriminating against nonresident corporations with respect to commercial fishing for menhaden in the Chesapeake Bay (App. 17, 19). As to Va. Code 28.1–81.1, the court held that the Bartlett Act of 1964, 78 Stat. 194, as amended, 16 U.S.C. 1081–1094, "preempted" the state law (App. 20). (Although 16 U.S.C. 1091–1094 were enacted as the Contiguous Fisheries Zone Act of 1966, 80 Stat. 908, we shall refer to these sections as part of the amended Bartlett Act.)

The court enjoined appellant from enforcing Va. Code 28.1–60 and 28.1–81.1 "in respect to the prohibitions of the [appellees] to engage in fishing for men-

haden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia" (App. 14–15).

SUMMARY OF ARGUMENT

I.

Appellees' vessels are licensed to engage in the fisheries under a federal law dating back to 1793. *Gibbons* v. *Ogden*, 9 Wheat. 1, held with respect to the same federal laws that a State could not prohibit a federally licensed vessel from engaging in the coasting trade in state waters. Likewise, a State may not prohibit a federally licensed vessel from engaging in the fisheries in state waters. The Virginia statutes in question deprive appellees and their vessels of the privileges granted by the federal license, the form of which has not changed since 1793. The Virginia statutes are therefore invalid under the Supremacy Clause.

There can be no doubt that the federal enrollment and licensing laws are a valid exercise of Congress' power under the Commerce Clause. Since the founding of this Nation, the fisheries have been considered one of the vital commercial enterprises in the United States, subject to regulation by Congress, as the statements of Pinckney during the Constitutional Convention in 1787 and Hamilton in *The Federalist No. 11* (Lodge ed. 1902) reveal. The menhaden fishery is no exception.

Menhaden migrate up and down the Atlantic coast; their capture in one State affects the number of these fish that may be harvested elsewhere; their capture anywhere requires navigation; they enter the streams

of foreign and domestic commerce in the form of industrial and agricultural products; the vessels fishing for them in the waters of the coastal states are engaged in a commercial venture subject to congressional regulation as surely as were the steamboats plying the inland waters between New York and New Jersey in the early 1800s.

II.

It is unnecessary for the Court to decide whether, as the district court held, Va. Code 28.1–81.1 is preempted by the Bartlett Act, as amended, 16 U.S.C. 1081–1094. In any event, the United States does not believe the Bartlett Act had this effect. The Act concerns fishing by foreign vessels; the vessels in this case are American. In prohibiting foreign fishing, Congress did not so occupy the general area of fisheries regulation that all state laws on the subject must fall even in the absence of conflicting federal legislation. The States have traditionally exercised regulatory authority over the coastal fisheries and Congress, by enacting the Bartlett Act, did not intend to affect the States' authority in this respect.

ARGUMENT

I

VIRGINIA CODE 28.1–60 AND 28.1–81.1 CONFLICT WITH THE FEDERAL ENROLLMENT AND LICENSING LAWS AND ARE THEREFORE UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE TO THE EXTENT THAT THEY RENDER FEDERALLY LICENSED VESSELS INELIGIBLE FOR STATE COMMERCIAL MENHADEN FISHING LICENSES

Although the district court did not cite the decision, we believe *Gibbons* v. *Ogden*, 9 Wheat. 1, controls this case. The state statutes at issue—Va. Code 28.1–60 and 28.1–81.1—conflict with the federal enrollment and licensing laws. Under the Supremacy Clause of the Constitution (Art. VI, Clause 2), the Commonwealth of Virginia may not absolutely forbid appellees' vessels from fishing for menhaden in the Chesapeake Bay and the territorial sea off the coast of Virginia.

Appellees' vessels have been enrolled and licensed pursuant to 46 U.S.C. 251, 252, 263 (App. 21)[12] and are therefore "deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries." 46 U.S.C. 251(a).[13] The federal license provides that the vessel is entitled to be employed in carrying on the "mackerel fishery," which includes the taking of menhaden.[14] 46 U.S.C. 263.

These provisions—46 U.S.C. 251, 252, 263—are derived directly from the Act of February 18, 1793, 1 Stat. 305, which, as Mr. Chief Justice Marshall pointed out in *Gibbons* v. *Ogden*, *supra*, 9 Wheat. at 211, was "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."[15] The issue here is whether a State may absolutely bar a vessel of the United States licensed to engage in the fisheries from engaging in that activity in the State's waters. *Gibbons* v. *Ogden* presented the same question with respect to the coasting trade.[16]

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[12] In order to be licensed and enrolled a vessel must meet the same conditions required for registration of a vessel as an American vessel. 46 U.S.C. 252. Appellees have met these requirements and have satisfied the citizenship test (see 46 U.S.C. 11) for vessels engaged in the fisheries, as set forth in 46 C.F.R. 67.03–5(a), which now provides:

> The term "citizen," in the case of a corporation, means one which is incorporated under the laws of the United States, or of any State thereof, of which the president or other chief executive officer, and the chairman of the board of directors are citizens of the United States, so long as no more of its directors than a minority of the number necessary to constitute a quorum shall be noncitizens.

Compare 46 C.F.R. 67.03–5(b), which provides, in regard to vessels that seek to engage in the coasting trade, the additional requirement that 75 percent of the interest in the corporation must be owned by citizens as specified in Section 2 of the Shipping Act of 1916, 39 Stat. 729, as amended, 46 U.S.C. 802.

[13] See Article 5 of the Convention on the High Seas, April 29, 1958 [1962], 13 U.S.T. 2312, T.I.A.S. No. 5200, which obligates each participating nation to "fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag." As the Preamble to the Convention indicates (13 U.S.T. at 2314), this requirement reflects the long-standing principle of international law that each nation must identify the vessels subject to its sovereign jurisdiction and protection.

[14] 46 U.S.C. 263, sets forth the form of the license, which is granted for a one-year term and must be renewed. See also, 46 C.F.R. 67.07–13(b) ("A vessel engaged in taking fish of any other description [other than cod or whales] shall be licensed for the mackerel fishery").

[15] See Revised Statutes 4311; *Harman* v. *Chicago*, 147 U.S. 396, 405. See also Act of December 31, 1792, 1 Stat. 287.

[16] See generally 2 Warren, *The Supreme Court in United States History* 47–92 (1922), which contains extensive background material on the case.

Ogden ran a steamboat line on inland waters between Elizabethport, New Jersey, on the shore of Newark Bay, to New York on the Hudson.[17] He held a license granted by Livingston, who, along with Fulton, enjoyed the exclusive right under New York statutes to run steamboats in the waters of New York. Under these state laws, Ogden sought and obtained an injunction in New York State court against Gibbons, who had started an opposition steamboat line. 9 Wheat. at 1–3. Gibbons' vessels were federally licensed pursuant to the Act of February 18, 1793, *supra*. 9 Wheat. at 2, 211–213.

In his opinion for the Court, Mr. Chief Justice Marshall held that the federal licenses entitled the vessels to engage in the coasting trade and that the New York statutes, which sought to prevent federally licensed vessels from transporting passengers in New York waters, must fall under the Supremacy Clause. *Id.* at 211–222.

The Court's reasoning applies here. The 1793 federal statute at issue in *Gibbons* v. *Ogden* related to "the coasting trade and fisheries"[18] and the federal licenses granted under its successor statutes follow the same form in regard to both activities. 46 U.S.C. 263. The form of the license, in fact, has remained substantially the same since 1793.[19]

[17] The Court stated the question as "'whether the laws of New-York * * * have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him." 9 Wheat. at 210.

[18] See Act of February 18, 1793, 1 Stat. 305, 306 (Sections 2 and 4).

[19] Compare Section 4 of the Act of February 18, 1973, 1 Stat. at 307, with 46 U.S.C. 263.

"The word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing * * *," 9 Wheat. at 213. In *Gibbons* v. *Ogden*, the federal licenses did not specifically authorize "a voyage from New Jersey to New York," *id.* at 214; here, appellees' federal licenses do not specifically authorize fishing for menhaden in the waters in question. In both cases, however, the licenses confer that authority as surely as if the specific activities had been mentioned: there is no doubt that the voyages of Gibbons' vessels engaged those vessels in the coasting trade and that menhaden fishing by appellees' vessels would engage them in the fisheries. *Ibid.*

The purpose of the federal license is not, as *Gibbons* v. *Ogden* makes clear, "to confer the American character" on the vessel. *Ibid.* That is the function of enrollment. *Ibid.*[20] "The object of the license" is "to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade" or, in this case, the fisheries. *Id.* at 215.[21]

The Virginia statutes, which exclude appellees' vessels entirely from the fishery at issue, deprive those vessels of the privileges conferred by the federal licenses. Appellant's contention that Virginia had good

[20] See, *e.g.*, *Pacific Shrimp Co.* v. *Department of Transportation*, 375 F. Supp. 1036, 1039 (W.D. Wash.).

[21] In light of *Gibbons* v. *Ogden*, the Court has consistently construed the federal enrollment and licensing laws as granting the authority to engage in the activity for which the license has been issued. *Kelly* v. *Washington*, 302 U.S. 1, 13; *Harman* v. *Chicago*, 147 U.S. 396, 404–405; *Cooley* v. *Board of Wardens*, 12 How. 299, 312.

reason for exercising its regulatory powers to prohibit appellees' vessels from fishing for menhaden in its waters[22] is beside the point.[23] Because the Virginia statutes conflict with federal law,[24] the federal law prevails under the Supremacy Clause. *Gibbons* v. *Ogden*, *supra*, 9 Wheat. at 210–211; *Richardson* v. *Harmon*, 222 U.S. 96.

Appellant contends, however, that the federal enroll-

[22] Brief for the Appellant 26–30.

[23] In any event, the evidence of fishing activity by foreign vessels, upon which appellant relies to justify the Virginia statutes (Brief at pp. 24–27), is irrelevant because the vessels excluded here were vessels of the United States.

As to the Chesapeake Bay, appellant offers no evidence that non-residents have depleted the menhaden fishery there. Instead, appellant merely predicts that this would occur because nonresidents would lack "the self-interest in preservation which motivates residents, who must depend upon a renewable resource for their livelihood" (*id.* at 33). But both resident and nonresident menhaden fishing firms depend upon a renewable resource for their livelihood. (Appellant apparently concedes that residents could engage in predatory fishing practices with impunity under Virginia law (Motion to Affirm, at p. 17).

While appellant argues that Virginia's laws are needed to avoid enforcement problems in regard to nonresidents (Br. 32–33) and noncitizens, even the exclusion of such persons will require enforcement.

[24] Va. Code 28.1–81.1 also conflicts with the federal enrollment and licensing laws in a somewhat different respect. Under federal law, appellees are considered citizens and their vessels are considered vessels of the United States entitled to the privileges of American vessels owned by citizens. See p. 12 and note 12, *supra*. By denying appellees the privilege of fishing for menhaden in Virginia waters on the basis that they are not citizens, Va. Code 28.1–81.1 is contrary to the federal laws prescribing who shall be considered a citizen for the purpose of engaging in the fisheries. Cf. *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 418.

ment and licensing laws cannot govern because the power of Congress under the Commerce Clause does not extend to the taking of fish (Brief, at p. 19). Mr. Chief Justice Marshall devoted the major portion of his opinion in *Gibbons* v. *Ogden* to a similar contention in regard to the same federal licensing law as applied to the coasting trade. 9 Wheat. at 187–209, 221–222. The business of fishing for menhaden is no less a part of interstate commerce than was the transportation of passengers from New Jersey to New York by steamboat, and the federal licensing law respecting both activities was within Congress' power to enact.

As Hamilton wrote in *The Federalist No. 11*, at 64 (Lodge ed. 1902), "There are rights of great moment to the trade of America which are rights of the Union —I allude to the fisheries * * *." Participating in the coastal fisheries, like participating in the coastal trade, depends on navigation and navigation is clearly within the commerce power. *Gibbons v. Ogden*, *supra*, 9 Wheat. at 192–193. Participating in the coastal fisheries, like participating in the coastal trade, depends in part on a continuous activity that transcends state and local boundaries.[25] Free swimming fish such as

[25] Even if the taking of menhaden in the waters of Virginia might be characterized as a "local act" (Brief for the Virginia Seafood Council, *et al.*, as *Amici Curiae*, pp. 9–10), it does not follow that it is beyond the reach of the Congress' power under the Commerce Clause. See, *e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111, 125 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' ").

menhaden have no regard for state boundaries. They spawn primarily in the open ocean [26] and swim up and down the coastal waters of Virginia and other States along the eastern seaboard as part of their migratory cycle. See pp. 5 to 7, *supra*. Commercial fishing for menhaden in the Chesapeake Bay or along the Virginia coast affects the numbers of these fish that frequent the coastal waters of other States.[27] Menhaden taken in Virginia waters and elsewhere enter the streams of foreign and domestic commerce in the form of agricultural and industrial products.[28]

[26] The United States has entered into treaties with Poland and the Soviet Union in order to protect the menhaden fishery by preventing their capture during the spawning season on the high seas. See Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Fisheries in the Western Region of the Middle Atlantic Ocean, June 13, 1970, 21 U.S.T. 1335, T.I.A.S. No. 6890; and Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, December 11, 1970, 21 U.S.T. 2664, T.I.A.S. No. 7009 (1971).

[27] Indeed, "21% of the recoveries from fish released in Chesapeake Bay in 1967 and 1968 occurred off the coasts of New York and New Jersey 1 yr later. These fish from Chesapeake Bay made up 72% of the catch in New York and New Jersey." Dryfoos, Cheek & Kroger, note 5, *supra*, at 733.

[28] Relying upon *McCready* v. *Virginia*, 94 U.S. 391, and the Submerged Lands Act, 67 Stat. 30, 43 U.S.C. 1311(a)(1), appellant argues that exclusion of persons or firms that fail to meet Virginia's citizenship and residency requirements is permissible, in part, because the State has title to and ownership of the menhaden located in the waters of the State (Brief, at 35). But see *Commonwealth* v. *Westcott*, 344 N.E. 2d 411 (Sup. Jud. Court Mass.), petition for a writ of certiorari pending, No. 75–1775.

The menhaden fishing industry, although one of our largest fishing industries, is not unique in this respect. As Hamilton's statement in *The Federalist No. 11* indicates, the pursuit, capture, processing and distribution involved in the exploitation of our coastal fisheries has from the beginning constituted—and continues to constitute—an integral part of this nation's interstate and foreign commerce. Indeed, during the Constitutional Convention in 1787 Charles Pinckney included "the fisheries" first among the five distinct commercial interests that would be subject to regulation by Congress in order to avoid "oppressive regulations" [29] from

Although language in the *McCready* opinion could be construed to support the State's claim of ownership of sedentary marine life located in the inland waters of a State, this Court, relying upon its decision in *Missouri* v. *Holland*, 252 U.S. 416, has subsequently affirmed the traditional principle denying ownership of free swimming fish until they have been reduced to possession. *Toomer* v. *Witsell*, 334 U.S. 385; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 420–421. Similarly, while the Submerged Lands Act granted the States title to the submerged lands underlying State waters and the natural resources within those lands and waters (43 U.S.C. 1311(a)(1)), it could not and did not grant title to free swimming fish in those waters. It merely granted the States what the United States possessed: the jurisdiction and power to regulate and manage those resources. 43 U.S.C. 1311(a)(2), 1314; S. Rep. No. 94–416, 94th Cong., 1st Sess. 15 (1975).

[29] 5 Elliot's *Debates on the Adoption of the Federal Constitution* 489 (Madison's Report on the Debates) (Supp. 1845); 2 Farrand, *Records of the Federal Convention of 1787*, p. 449 (1966 ed.). Pinckney's proposed draft of the Constitution provided that Congress had power "To regulate commerce with all nations, and among the several states." 5 Elliot *supra*, at 130; 1 Farrand, *supra*, at 23; 3 Farrand, *supra*, App. D, at 598; but see *id.* at App. D, pp. 602–604 (regarding the question whether this version of Pinckney's draft was the same as that submitted by him during the Convention in 1787).

States pursuing their own interests.[30] Moreover, in order to protect the fisheries, Congress recently enacted legislation to extend exclusive jurisdiction over fishing to a limit of two hundred miles from our coastline and to establish a regulatory system to manage the fishery resources of those waters. Fishery Conservation and Management Act of 1976, Pub. L. 94–265, 90 Stat. 331, 16 U.S.C. 1801, *et seq.* See note 40, *infra.*

The federal enrollment and licensing laws with respect to vessels engaged in the fisheries are therefore a valid exercise of Congress' power under the Commerce Clause.[31] The Virginia statutes seek to exclude, not regulate, federally licensed vessels whose owners fail to meet the state's citizenship and residency requirements. Virginia's statutes discriminate against such vessels and, like the state legislation at issue in

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[30] As to the commercial importance of the fisheries, see the remarks of Mr. Grayson during the Virginia Debates on Adoption of the Federal Constitution in 3 Elliot *supra,* 277–278, 343 (2d ed. 1854); and the February 1, 1791, report of Thomas Jefferson, then Secretary of State, to the House of Representatives regarding the need for the federal government to fulfill its "obligation of effectuating free markets for [the fisheries]." 1 *American State Papers, Commerce and Navigation 1789–1815,* p. 12 (1832).

For a history of the early fisheries of the United States, see Sabine, *Report on the Principal Fisheries of the American Seas,* H.R. Exec. Doc. No. 23, 32d Cong., 2d Sess. 181 (1852).

[31] See also Story, 2 *Commentaries on the Constitution* 25 (2d ed. 1851):

> It is not doubted, that [the commerce power] extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without, any state, wherever it is connected with the commerce or intercourse with any other state, or with foreign nations.

Gibbons v. *Ogden,* have "come into collision with an act of Congress." 9 Wheat. at 210.[32] Under the Supremacy Clause, the Virginia statutes are unconstitutional to the extent that they render federally licensed vessels ineligible to participate in the menhaden fishery.[33]

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[32] Relying upon *Manchester* v. *Massachusetts,* 139 U.S. 240, and *Toomer* v. *Witsell,* 334 U.S. 385, appellant argues that this Court has already rejected the theory that federal enrollment and licensing confers upon vessel owners the right to take fish from coastal waters of the United States. Neither of these cases supports appellant's position.

In *Manchester* v. *Massachusetts* this Court upheld a state statute regulating fishing for menhaden in state waters. The Court did not address the question whether a federal license to engage in the coastal fisheries constituted a grant to fish in those waters. Instead, the Court concluded only that a State could regulate activities of vessels fishing in state waters, including vessels fishing under a federal license. 139 U.S. at 266.

In *Toomer* v. *Witsell* the Court struck down a South Carolina law that discriminated against nonresidents in regulating commercial shrimp fishing in the territorial sea off the coast of that State. The Court did not address the question whether a federal license to engage in the coastal fisheries constituted a grant of the privilege to fish. The Court did conclude, however, that state regulations imposing a discriminatory license fee on vessels owned by nonresidents violated the Privileges and Immunities Clause and that the requirement that shrimp fishing boats dock at a South Carolina port and unload, pack and stamp their catch unconstitutionally burdened interstate commerce. 334 U.S. at 395–406.

[33] The United States does not dispute Virginia's authority to manage the coastal fisheries through reasonable regulations in the absence of federal legislation on the subject. Compare *Toomer* v. *Witsell, supra*; *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440.

II

THE BARTLETT ACT DOES NOT PREEMPT STATE JURISDICTION TO REGULATE FISHING BY VESSELS OF THE UNITED STATES WITHIN THE TERRITORIAL SEA

As the foregoing discussion indicates, we believe *Gibbons* v. *Ogden* disposes of this case. It is therefore unnecessary for this Court to decide whether, as the court below held, Virginia's statute denying commercial fishing licenses to noncitizens (Va. Code 28.1–81.1) is preempted by the Bartlett Act, as amended, 16 U.S.C. 1081–1094 (App. 20–21).[34] However, because we do not agree with the district court's view of the effect of the Bartlett Act, we shall explain the basis for our disagreement.

The Bartlett Act is designed to prevent foreign fishing in the coastal waters of the United States [35] by prohibiting foreign vessels from taking fish within twelve nautical miles of the United States coast. 16 U.S.C. 1081, 1091.[36] The Act filled a gap in existing law, which (as we have discussed above) provided for participa-

[34] For the same reason it is unnecessary for the Court to decide whether, as the district court held, Va. Code 28.1–60 violates the Equal Protection Clause by preventing nonresidents from fishing for menhaden in the Chesapeake Bay. Cf. *Toomer* v. *Witsell*, 334 U.S. 385.

[35] See generally Fidell, *Ten Years Under the Bartlett Act: A Status Report on the Prohibition on Foreign Fishing*, 54 Boston Univ. L. Rev. 703 (1974).

[36] Violations are punishable by fines of not more than $100,000 or imprisonment for not more than one year, or both. 16 U.S.C. 1082(a). In addition, the offending vessel may be seized and forfeited. 16 U.S.C. 1082(b).

tion in the nation's fisheries by vessels of the United States (46 U.S.C. 251) but provided no recourse against fishing by foreign vessels except the boarding of the vessels by the Coast Guard and the escorting of the ship to the high seas. S. Rep. No. 500, 88th Cong., 1st Sess. 5, 11 (1963). See *United States* v. *Ayo-Gonzalez*, 536 F. 2d 652, 658–659 (C.A. 5).

It is apparent that on the facts of this case, the application of Va. Code 28.1–81.1 to appellees does not conflict with the Bartlett Act. Appellees' vessels are vessels of the United States;[37] the Act concerns only foreign vessels.[38]

Likewise, we see no basis for concluding that the Bartlett Act has so occupied the field that States are precluded from regulating the fisheries even though their laws do not conflict with the provisions of the

[37] See Section 1 of the Act, 16 U.S.C. 1081, which provides in relevant part:

> It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States * * *.

[38] Appellant contends that the Bartlett Act did not preempt state jurisdiction to regulate foreign vessels fishing in the territorial sea, suggesting that the coastal States possess that jurisdiction. Brief, at 5, 6, 13, 15. We do not believe that issue should be decided in this case. No party to these proceedings denies that appellees' vessels are vessels of the United States as that term is used in the Bartlett Act. *Id.* at 13, 15. Moreover, there is pending before this Court in *United States* v. *Florida and Texas*, No. 54, Original, a motion for leave to file a counterclaim concerning state jurisdiction over foreign vessels in the territorial sea. The United States is opposing that counterclaim.

Act. See *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 327; *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 444–448. The Virginia statute at issue, as applied here, does not frustrate or stand as an obstacle to the achievement of Congress' goal in the Bartlett Act of preventing fishing by foreign vessels.[39] Moreover, in light of the narrow purpose of the Bartlett Act, it is hardly so pervasive a scheme of federal regulation " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Pennsylvania* v. *Nelson*, 350 U.S. 497, 502, quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230.

Indeed, the jurisdiction and authority of the coastal States to regulate fishing by United States vessels in waters within state boundaries has long been recognized. See, *e.g.*, Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301, 1311; *Toomer* v. *Witsell*, *supra*, 334 U.S. at 393. The Bartlett Act merely complements the State regulatory systems and was prompted by the increasing numbers of foreign violations of our territorial waters that accompanied the tremendous increase in foreign exploitation of the fishing grounds adjacent to our coasts during the two years preceding passage of that Act. H.R. Rep. No. 1356, 88th Cong., 2d Sess. 4, 10 (1964); S. Rep. No. 91–1320, 91st Cong., 2d Sess. 1–4 (1970).

[39] See *Hines* v. *Davidowitz*, 312 U.S. 52, 67 ("Our primary function is to determine whether, under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"), quoted in *Goldstein* v. *California*, 412 U.S. 546, 561.

Congress itself emphasized that it was not diminishing the jurisdiction of the States: the Senate Commerce Committee stated that the "bill will not preempt the States of their powers against trespassers of their territorial seas." S. Rep. No. 500, 88th Cong., 1st Sess. 4 (1963). Soon after the enactment of the Bartlett Act, Congress again emphasized its desire not to preempt the jurisdiction of the States to regulate fishing by vessels of the United States in the territorial sea adjacent to their coasts. In the Contiguous Fisheries Zone Act of 1966, 16 U.S.C. 1091, *et seq.*, Congress extended the prohibition against foreign fishing, established in the Bartlett Act for the territorial sea, seaward to a distance of twelve miles. 16 U.S.C. 1091. In doing so, Congress specifically provided that nothing in that Act shall be construed as diminishing the jurisdiction of the States over the natural resources of the territorial sea, 16 U.S.C. 1094, which is a still further indication that the Bartlett Act did not preempt the state jurisdiction over the fisheries. See also H.R. Rep. No. 2086, 89th Cong., 2d Sess. 10 (1966) (recognizing "the jurisdiction of the States within the 3-mile coastal area").[40]

[40] See also Section 306(b) of the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1856, discussed at p. 20, *supra*, in which Congress explicitly provided that nothing in the Act is intended to diminish the jurisdiction the States exercise over fishing within state boundaries and provided for a limited preemption of state jurisdiction within the territorial seas when State regulation conflicts with federal regulations with respect to a fishery extending beyond state waters. See S. Rep. No. 94–416, 94th Cong., 1st Sess. 5, 15, 41 (1975).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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APPENDIX

Section 251 of Title 46 U.S.C. provides as follows:

(a) Vessels of twenty tons and upward, enrolled in pursuance of sections 251 to 255, 258, 259, 262 to 280, 293, 306 to 316, 318, 321 to 330 and 333 to 335 of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force, as required by such sections, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries. Except as otherwise provided by treaty or convention to which the United States is a party, no foreign-flag vessel shall, whether documented as a cargo vessel or otherwise, land in a port of the United States its catch of fish taken on board such vessels on the high seas or fish products processed therefrom, or any fish or fish products taken on board such vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products.

(b) Subsection (a) of this section shall not be deemed to prohibit the landing by a foreign-flag vessel of not more than fifty feet overall length in a port of the Virgin Islands of the United States for immediate consumption in such islands of its catch of fresh fish, whole or with the heads, viscera, or fins removed, but not frozen, otherwise processed, or further advanced. No fish landed under this authorization shall be sold or transferred except for immediate consumption. Sale or transfer to an agent, representative, or employee of a freezer or cannery shall be deemed to be prohibited in

the absence of satisfactory evidence that such sale or transfer is for immediate consumption. For the purposes of this subsection, the term "immediate consumption" shall not preclude the freezing, smoking, or other processing of such fresh fish by the ultimate consumer thereof.

(c) Any fish landed in the Virgin Islands of the United States which are retained, sold, or transferred other than as authorized in subsection (b) of this section shall be liable to forfeiture and any person or persons retaining, selling, transferring, purchasing, or receiving such fish shall severally be liable to a penalty of $1,000 for each offense, in addition to any other penalty provided in law.

Section 252 of Title 46 U.S.C. provides as follows:

In order for the enrollment of any vessel, she shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel, and the same powers and duties are conferred and imposed upon all officers, respectively, and the same proceedings shall be had, in enrollment of vessels, as are prescribed for similar cases in registering; and vessels enrolled, with the masters or owners thereof, shall be subject to the same requirements as are prescribed for registered vessels.

Section 263 of Title 46 U.S.C. provides as follows:

The form of a license for carrying on the coasting trade or fisheries shall be as follows:

"License for carrying on the (here insert 'coasting trade', 'whale fishery', 'mackerel fishery', or 'cod fishery', as the case may be).

"In pursuance of Title L, 'Regulation of Vessels in Domestic Commerce', of the Revised Statutes of the United States, (inserting here the name of the husband or managing owner, with his occupation and place of abode, and the name of the master, with the place of his abode), having sworn that the (insert here the description of the vessel, whether ship, brigantine, scow, schooner, sloop, or whatever else she may be), called the (insert here the vessel's name), whereof the said (naming the master) is master, burden (insert here the number of tons, in words) tons, as appears by her enrollment, dated at (naming the district, day, month, and year, in words at length, but if she be less than twenty tons, insert, instead thereof, 'proof being had of her admeasurement'), shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn (or affirmed) that this license shall not be used for any other vessel, or for any other employment, than is herein specified, license is hereby granted for the said (inserting here the description of the vessel) called the (inserting here the vessel's name), to be employed in carrying on the (inserting here 'coasting trade', 'whale fishery', 'mackerel fishery', or 'cod fishery', as the case may be), for one year from the date hereof, and no longer. Given under my hand and seal, at (naming the said district), this (inserting the particular day) day of (naming the month), in the year (specifying the number of the year in words at length);": *Provided*, That vessels of five net tons and over entitled under the laws of the United States to be enrolled and licensed or licensed for the

coasting trade may be licensed for the "coasting trade and mackerel fishery", and shall be deemed to have sufficient license for engaging in the coasting trade and the taking of fish of every description, including shellfish: *Provided further*, That the provisions of sections 310 and 311 of this title shall be, and are hereby, made applicable to vessels so licensed: *And provided further*, That vessels operating on the Great Lakes and their connecting and tributary waters under enrollment and license issued in conformity with the provisions of section 258 of this title, shall be deemed to have sufficient license for engaging in the taking of fish of every description within such waters without change in the form of enrollment and license prescribed under the authority of that section.

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